

PRINCIPLES
OF THE
LAW OF REAL PROPERTY,

INTENDED AS
A FIRST BOOK
FOR
THE USE OF STUDENTS IN CONVEYANCING.

BY THE LATE
JOSHUA WILLIAMS, ESQ.,
OF LINCOLN'S INN, ONE OF HER MAJESTY'S COUNSEL.

The Fifteenth
BY HIS SON,
T. CYPRIAN WILLIAMS, ESQ.,
OF LINCOLN'S INN, BARRISTER-AT-LAW, LL.B.
*Author of "Williams's Conveyancing Statutes," and Editor of "Williams on
Personal Property."*

LONDON:
H. SWEET & SONS, 3, CHANCERY LANE,

DUBLIN: HODGES, FIGGIS & CO.
MANCHESTER: MÉRÉDITH, RAY & LITTLER.
MELBOURNE AND SYDNEY: C. F. MAXWELL.

• 1885

LONDON :
PRINTED BY C. F. ROWORTH, GREAT NEW STREET, FETTER LANE, E.C

PREFACE

TO THE FIFTEENTH EDITION.

IN this Edition the principal alterations in the text are those rendered necessary by the changes made in law and practice since the publication of the last Edition, especially by the Settled Land Act, 1882, the Conveyancing Act, 1882, the Married Women's Property Act, 1882, the Agricultural Holdings Act, 1883, and the Yorkshire Registries Act, 1884. Besides these alterations, the Editor has added the notes on the introduction of feudal tenures (p. 3, n. (*q*)), the classification of property, as real or personal (p. 14, n. (*c*)), the introduction of hereditary estates (p. 21, n. (*c*)), and the difference between the rights of trustee and cestui que trust (p. 193, n. (*y*)). The additional pages (pp. 145—148) relating to the early history of free tenure are the Editor's. And the account here given of the

origin of copyhold estates (pp. 403—416), which now appears for the first time, was entirely written by him. The paragraph (pp. 523—525) on mortgages of land in Middlesex or Yorkshire is also new.

7, STONE BUILDINGS, LINCOLN'S INN,
7th May, 1885.

PREFACE

TO THE FOURTEENTH EDITION.

IN this Edition the alterations which have taken place in the law since the publication of the last Edition have been incorporated in the text. The work of preparing this Edition was not commenced until after the Author's death; and I alone am responsible for all alterations in, and additions to, the text of the last Edition. For my own part, I should have preferred to preserve a distinction between the original text of the Author, and all new matter of my own, by inclosing the latter within brackets; but I do not think that this plan is advisable in a book intended for students. The principal additions are those dealing with the changes in the law made by the Conveyancing and Law of Property Act, 1881. In particular, the last Chapter (Part VI.) is entirely my own. I can only hope that the value of my late father's Work has not been impaired by my treatment of it.

T. CYPRIAN WILLIAMS.

PREFACE

TO THE FIRST EDITION.

THE Author had rather that the following pages should speak for themselves, than that he should speak for them. They are intended to supply, what he has long felt to be a desideratum, a First Book for the use of students in conveyancing, as easy and readable as the nature of the subject will allow. In attempting this object he has not always followed the old beaten track, but has pursued the more difficult, yet more interesting, course of original investigation. He has endeavoured to lead the student rather to work out his knowledge for himself, than to be content to gather fragments at the hand of authority. If the student wishes to become an adept in the practice of conveyancing, he must first be a master of the science ; and if he would master the science, he should first trace out to their sources those great and leading principles, which, when well known, give easy access to innumerable minute details.

The object of the present work is not, therefore, to cram the student with learning, but rather to quicken his appetite for a kind of knowledge which seldom appears very palatable at first. It does not profess to present him with so ample and varied an entertainment as is afforded by Blackstone in his "Commentaries;" neither, on the other hand, is it as sparing and frugal as the "Principles" of Mr. Watkins; nor, it is hoped, so indigestible as the well-packed "Compendium" of Mr. Burton. This work was commenced many years ago; and it may be right to state that the substance of the introductory chapter has already appeared before the public in the shape of an article, "On the Division of Property into Real and Personal," in the "Jurist" newspaper for 7th September, 1839. The recent Act to simplify the transfer of property has occasioned many parts of the work to be re-written. But as this Act has so great a tendency to bewilder the student, the Author has since lost no time in committing his manuscript to the press, in hopes that he may be the means of bringing the minds of such beginners as may peruse his pages to that tone of quiet perseverance which alone can enable them to grapple with the increasing difficulties of

Real Property Law. From the elder members of his profession he requests, and has no doubt of obtaining, a candid judgment of his performance of a most difficult task. To give to each principle its adequate importance,—from the crowds of illustrations to present the best,—to write a book readable, yet useful for reference,—to avoid plagiarism, and yet abide by authority,—is indeed no easy matter. That in all this he has succeeded he can scarcely hope. How far he has advanced towards it must be left for the profession to decide.

3, NEW SQUARE, LINCOLN'S INN,
29th November, 1844.

TABLE OF CONTENTS.

	PAGE
INTRODUCTORY CHAPTER.	
OF THE CLASSES OF PROPERTY.....	1
PART I.	
OF CORPOREAL HEREDITAMENTS	17
CHAP. I.	
OF AN ESTATE FOR LIFE	20
CHAP. II.	
OF AN ESTATE TAIL	57
CHAP. III.	
OF AN ESTATE IN FEE SIMPLE.....	83
CHAP. IV.	
OF THE DESCENT OF AN ESTATE IN FEE SIMPLE.....	125
CHAP. V.	
OF THE TENURE OF AN ESTATE IN FEE SIMPLE	143
CHAP. VI.	
OF JOINT TENANTS AND TENANTS IN COMMON.....	162
CHAP. VII.	
OF A FEOFFMENT	

CHAP. VIII.

	PAGE
OF USES AND TRUSTS	186

CHAP. IX.

OF A MODERN CONVEYANCE	216
------------------------------	-----

CHAP. X.

OF A WILL OF LANDS	245
--------------------------	-----

CHAP. XI.

OF THE MUTUAL RIGHTS OF HUSBAND AND WIFE	266
--	-----

PART II.

OF INCORPOREAL HEREDITAMENTS	288
------------------------------------	-----

CHAP. I.

OF A REVERSION AND A VESTED REMAINDER	290
---	-----

CHAP. II.

OF A CONTINGENT REMAINDER	311
---------------------------------	-----

CHAP. III.

OF AN EXECUTORY INTEREST	338
--------------------------------	-----

Section 1.

OF THE MEANS BY WHICH EXECUTORY INTERESTS MAY BE CREATED	338
---	-----

Section 2.

OF THE TIME WITHIN WHICH EXECUTORY INTERESTS MUST ARISE	368
--	-----

CHAP. IV.

OF HEREDITAMENTS PURELY INCORPOREAL	374
---	-----

PART III.

	PAGE
OF COPYHOLDS.....	403

CHAP. I.

OF ESTATES IN COPYHOLDS.....	417
------------------------------	-----

CHAP. II.

OF THE ALIENATION OF COPYHOLDS.....	437
-------------------------------------	-----

PART IV.

OF PERSONAL INTERESTS IN REAL ESTATE ..	452
---	-----

CHAP. I.

OF A TERM OF YEARS	454
--------------------------	-----

CHAP. II.

OF A MORTGAGE DEBT	499
--------------------------	-----

PART V.

OF TITLE	530
----------------	-----

PART VI.

OF THE PRESENT FORM OF A CONVEYANCE..	571
---------------------------------------	-----

APPENDIX (A.)	585
APPENDIX (B.)	591
APPENDIX (C.)	605
APPENDIX (D.)	628
APPENDIX (E.)	636
APPENDIX (F.)	647
APPENDIX (G.)	649
INDEX	651

INDEX TO CASES CITED.

A.

	PAGE
ABBISS <i>v.</i> Burney	334, 371
Abernethy, Boddington <i>v.</i> ..	449
Ackroyd <i>v.</i> Smith	381
Acocks <i>v.</i> Phillips	294
Adams, Doe <i>d.</i> Barney <i>v.</i>	502
—— Rowley <i>v.</i>	463
<i>v.</i> Savage	364
Smith <i>v.</i>	451
Adsetts <i>v.</i> Hives	180
Ainslie <i>v.</i> Harcourt	481
Albany's case	360
Aldborough, Lord, <i>v.</i> Trye ..	559
Aldous <i>v.</i> Cornwell	180
Allan <i>v.</i> Backhouse	481
Allcock <i>v.</i> Moorhouse	297, 456
Allen <i>v.</i> Allen	82, 89
—— Festing <i>v.</i>	320
—— <i>v.</i> Walker	212
Alston <i>v.</i> Atlay	399
Ambrose, Hodgson and Wife <i>v.</i>	253
Amcotts, Ingilby <i>v.</i>	327
Amey, Doe <i>v.</i>	110
Amherst, Earl of, Duke of Leeds <i>v.</i>	33
Anderson <i>v.</i> Pignet	287, 495
Andrew <i>v.</i> Motley	250
Andrews <i>v.</i> Hulse	414
Anglo-Italian Bank <i>v.</i> Davies	113
Annesley, Tooker <i>v.</i>	31
Anon., Cro. Eliz. 46	220
—— 1 Vern. 318	117
—— <i>v.</i> Cooper	477, 478
Anson, Lord, Winter <i>v.</i>	515
Anstey, Saward <i>v.</i>	386
Appleton <i>v.</i> Rowley	275
Archer's case	313
Arden <i>v.</i> Wilson	435
Armitage, Earl of Cardigan <i>v.</i>	18
Armstrong, Tullett <i>v.</i>	120, 268
Arnal, Ex parte	474
Arnold, Cattley <i>v.</i>	40
Arthur, Vyvyan <i>v.</i>	463
Ash <i>v.</i> Royle	415
Ashberry, Harlock <i>v.</i>	553
Ashton <i>v.</i> Jones	97

W.R.P.

Astley <i>v.</i> Micklethwait	334
Aston, Yates <i>v.</i>	
Atherstone, Nickells <i>v.</i>	
Atkinson <i>v.</i> Baker ...	
Atlay, Alston <i>v.</i>	335
Att.-Gen. <i>v.</i> Lord Braybrooke	335
—— Casberd <i>v.</i>	115
—— <i>v.</i> Chambers	380
Charlton <i>v.</i>	335, 360
Floyer	335, 360
<i>v.</i> ———	
<i>v.</i> Hallett	337
<i>v.</i> Hamilton	168
<i>v.</i> Littledale	336
<i>v.</i> Lord Middleton.	335
<i>v.</i> Sefton, Earl of .	336
<i>v.</i> Sibthorpe	335

Smythe

Audley, Jee <i>v.</i>	77
Austin, Webb <i>v.</i> ...	
Aveline <i>v.</i> Whisson.	
Awdry, Cloves <i>v.</i>	
Aylesford, Lord, <i>v.</i> Morris ..	559
Aynsley <i>v.</i> Glover	

B.

Bacchus, Bedford <i>v.</i>	524
Backhouse, Allan <i>v.</i>	481
Bonomi <i>v.</i>	18
<i>v.</i> ...	383
Bacon <i>v.</i> Procter	372
Baggett <i>v.</i> Meux	269
Bagot <i>v.</i> Bagot	30
Bailey <i>v.</i> Ekins	105
—— Keppel <i>v.</i>	463
Baillie <i>v.</i> Treharne	166
Bainbridge, Hall <i>v.</i>	179
Baird <i>v.</i> Fortune	381
Baker, Atkinson <i>v.</i>	26
<i>v.</i> Gostling	478
<i>v.</i> Sebright	33
Thornborough <i>v.</i>	453
<i>v.</i> White	259

b

	PAGE		PAGE
Banks, Right <i>d.</i> Taylor <i>v.</i>	430	Bird <i>v.</i> Higginson	458
Barber, Mackintosh <i>v.</i>	363	Birkbeck, Cort <i>v.</i>	626
Barker <i>v.</i> Barker.....	274	Blackall, Long <i>v.</i>	869
——— Lowrey, <i>v.</i>	474	Blackburn, Harrison <i>v.</i>	220
——— Payne <i>v.</i>	589	——— <i>v.</i> Stables.....	319
——— Prescott <i>v.</i>	473	Blackmore, Mathew <i>v.</i>	529
——— Re.....	360	Blagrove, Powys <i>v.</i>	30
Barkshire <i>v.</i> Grubb	381, 579	Blain, Heelis <i>v.</i>	220
Barlow <i>v.</i> Rhodes	381	Blake <i>v.</i> Blake	246
——— Wright <i>v.</i>	346	——— Perrin <i>v.</i>	255, 304
Barnes <i>v.</i> Mawson	626	——— Shrapnell <i>v.</i>	512
——— <i>v.</i> Robinson.....	267	Bligh <i>v.</i> Brent	9
Barnett, Muggleton <i>v.</i> ..	127, 585, 588, 589	Bliss <i>v.</i> Collins.....	468
Barrett <i>v.</i> Rolph	478	——— Dean of Ely <i>v.</i>	552
Barrington <i>v.</i> Liddell.....	372	Blissett, Chapman <i>v.</i>	334
Barrow <i>v.</i> Wadkin	198	Blood, Creagh <i>v.</i>	481
Bartholomew, Drybutter <i>v.</i> ..	9	Blunt, Griffith <i>v.</i>	369
Bartle, Doe <i>d.</i> Nethercote <i>v.</i> ...	442	Blythe, Westbrook <i>v.</i>	474
Bartlett, Rose <i>v.</i>	473	Boddington <i>v.</i> Abernethy	449
Bassett, Upton <i>v.</i>	103	Boen, Yates <i>v.</i>	89
Bateman <i>v.</i> Hodgkin	372	Bolingbroke, O'Rorke <i>v.</i>	559
Bates <i>v.</i> Johnson.....	523	Bolton, Lord, <i>v.</i> Tomlin	458
Baxter, Mainwaring <i>v.</i>	73	Bond <i>v.</i> Rosling	458
Baynton <i>v.</i> Collins	271	Bonham, Farley <i>v.</i>	285
Beale <i>v.</i> Symonds	198	Bonifant <i>v.</i> Greenfield	363
Beardman <i>v.</i> Wilson	477	Bonomi <i>v.</i> Backhouse	18
Bearpark <i>v.</i> Hutchinson	388	Booth <i>v.</i> Smith	391
Beaufort, Duke of, <i>v.</i> Mayor, &c. of Swansea..	380	——— Snow <i>v.</i>	550
——— Duke of, <i>v.</i> Phillips .	110	Boothby, Tunstall <i>v.</i>	120
Beaumont <i>v.</i> Marquis of Salisbury	477	Boraston's case	314
Beavan <i>v.</i> Earl of Oxford	111	Borman, Scarborough <i>v.</i> ...	120, 248
Bedford <i>v.</i> Bacchus.....	524	Borrows <i>v.</i> Ellison	550
Beever <i>v.</i> Luck	529	Bosanquet, Williams <i>v.</i>	462
Belaney <i>v.</i> Belaney.....	11	Bousfield, Doe <i>d.</i> Robinson <i>v.</i> ...	419
Bell, Consett <i>v.</i>	31	Bovey's, Sir Ralph, case	489
——— Love <i>v.</i>	18	Bower <i>v.</i> Cooper	197
Bellamy, Re.....	479	Bowker <i>v.</i> Burdekin	180
——— <i>v.</i> Sabine	117	Bowler, Matthew <i>v.</i>	516
Bennet <i>v.</i> Bishop of Lincoln..	399	Bowles', Lewis, case	33
——— <i>v.</i> Box	203	Bowser <i>v.</i> Colby	295
Bennett <i>v.</i> Reeve	606, 609	——— <i>v.</i> Maclean	418
Bennison <i>v.</i> Cartwright	556	Box, Bennet <i>v.</i>	
Benson <i>v.</i> Chester	615	Brace <i>v.</i> Duchess of Marlborough	109, 523
Bentley, Poole <i>v.</i>	459	Brackenbury <i>v.</i> Gibbons	320
Berridge <i>v.</i> Ward	379	Bradburn <i>v.</i> Foley	482
Berrington <i>v.</i> Scott	76	Bradbury <i>v.</i> Wright	471
Bestwick, Thorpe <i>v.</i>	249	Bradford <i>v.</i> Brownjohn	481
Betts <i>v.</i> Thompson	376, 605	Bradley <i>v.</i> Riches	524
Beverley, Case of the Provost of	308	Brandon <i>v.</i> Robinson ..	119, 120, 268
Bewit, Whitfield <i>v.</i>	30	Brandreth, Lucas <i>v.</i>	24
Bewley, Noel <i>v.</i>	331	Branker, Cunliffe <i>v.</i>	329
Bickett <i>v.</i> Morris.....	379	Braybrooke, Lord, Att.-Gen. <i>v.</i>	
Biggs, Mestayer <i>v.</i>	383	Brent, Bligh <i>v.</i>	
Bingham <i>v.</i> Woodgate	421	Brett <i>v.</i> Clowser	
		Bridge <i>v.</i> Yates	
		Bridgewater, Welden <i>v.</i>	615

	PAGE		PAGE
Bridgman's, Sir Orlando, Case		Cardigan, Earl of, v. Armitage	18
and opinion of	615	Cardross's Settlement, Re....	350
Briggs v. Sowry	474	Carleton v. Leighton	327
Bristow v. Warde	325	Carr v. Lambert	615
Brocklehurst, Wardle v.	381	Carrick, Ralph v.	373
Brogden, Humphries v.	18	Carter, Parker v.	276
Brooke v. Pearson	120	Cartwright, Bennison v.	556
Brookes, Millership v.	180	Corser v.	263
Broughton v. James	373	Casberd v. Attorney-General..	115
Brown's Will, Re	49	Catomore, Doe d. Tatum v. ..	180
Brown, Caldecott v.	47	Cator v. Cooley	524
—— Cattlin v.	323	Cattley v. Arnold	40
—— Scratton v.	380	Cattlin v. Brown	323
—— Willis v.		Cattling, Wills v.	478
Browne v. Browne		Chadwick v. Turner	264
Brownjohn, Bradford v.	481	Challis v. Doe d. Evers	324
Brownlow, Earl, Smith v. ...	376, 605	Chamberlain, Cox v.	351
—— Pate v.	615	Chambers, Attorney-General v.	389
Brudenell v. Elwes	73, 323	—— v. Kingham	490
Brummell v. Macpherson	465	Champion, Edwards v.	82
Brydges v. Brydges	215	Champneys, Sturgis v.	267
Buckeridge v. Ingram	9	Chandless, Hall v.	180
Buckland v. Pocknell	515	Chapman v. Blisset	334
Buckley, Earl of Stafford v. ..	64	—— v. Gatcombe	401
—— Frend v.	540	—— v. Tanner	515
—— v. Howell	358	Charlesworth, Manners v.	168
Burdekin, Bowker v.	182	Charlton v. Attorney-General	335, 360
Burdett v. Doe d. Spilisbury ..	347		
Burges, Hare v.	480	Chaytor's Settled Estate Act,	
—— v. Lamb	33	Re	53
Burgess v. Wheate	24, 198	Cheese v. Lovejoy	250
Burlington, Earl of, Doe d.		Cheetham, Lloyd v.	120
Grubb v.	419	Cherry v. Heming	184
Burney, Abbiss v.	334, 371	Cheslyn, Pearce v.	459
Barrell v. Dodd	420	Chester, Benson v.	615
Burroughes, Wright v.	295	—— Bishop of, Fox v.	399
Burt, Edwards v.	559	—— Lowe v.	399
Busher, app., Thompson, resp.	421	—— v. Willan	166
Bustard's case	532	Chetham v. Hoare	551
Battery v. Robinson	386	Cheyne, Eccles v.	254
Butts, Trower v.	319	Chichester v. Donegal (Marq. of)	559
Byron, Doe d. Wyatt v.	295	—— Rawe v.	481
—— Hall v.	376, 605	Cholmeley, Cockerell v.	357
		—— v. Paxton	33
		Chorley, The Queen v.	557
		Christie v. Ovington	141
		Chudleigh's case	190, 313
		Clark, Doe d. Spencer v.	426
		Clarke, Doe v.	319
		—— v. Franklin	286, 353
		Clay v. Sharpe	510
		Clegg v. Fishwick	481
		Clements v. Matthews	194
		—— v. Sandaman	123
		Clere's, Sir Edward, case	350
		Clifton, Doe d. Hurst v.	505
		Clossey, Re	27
		Cloves v. Awdry	351

C.

Cadell v. Palmer	73, 369
re, Smithson v.	17
—— Cahill	279
Caldecott v. Brown	47
Caldwell v. Fellowes	
Calmady v. Rowe	
Calvin's case	
v. Lucy	
v. Canning	

INDEX TO CASES CITED.

	PAGE		PAGE
Dennis, Re	27	Doe <i>d.</i> Brune <i>v.</i> Martyn	175
Dennison, Lucas <i>v.</i>	552	— <i>d.</i> Biddulph <i>v.</i> Meakin ..	18
Dent <i>v.</i> Dent	47	— <i>d.</i> Twining <i>v.</i> Muscott ..	444
Dering, Monypenny <i>v.</i> ..	323, 325	— Nepean <i>v.</i>	549
Dickin <i>v.</i> Hamer	282	— <i>d.</i> Christmas <i>v.</i> Oliver ..	326
Dickins, Morecock <i>v.</i>	524	— <i>d.</i> Freestone <i>v.</i> Parratt ..	273
Dimes <i>v.</i> Grand Junction Canal		— <i>d.</i> Lloyd <i>v.</i> Passingham ..	192
Company	444	— <i>d.</i> Mansfield <i>v.</i> Peach ..	346
Dixon, Doe <i>d.</i> Crosthwaite <i>v.</i> ..	129	— <i>d.</i> Pring <i>v.</i> Pearsey	379
— <i>v.</i> Gayfere	515	— <i>d.</i> Flower <i>v.</i> Peck	467
— <i>v.</i> White	18	— <i>d.</i> Blight <i>v.</i> Pett	490
Dodd, Burrell <i>v.</i>	420	— <i>d.</i> Church <i>v.</i> Pontifex ..	383
Dodds <i>v.</i> Thompson	386	— <i>d.</i> Biddulph <i>v.</i> Poole	480
Doe <i>d.</i> Barney <i>v.</i> Adams	502	— <i>d.</i> Starling <i>v.</i> Prince	244
— <i>v.</i> Amey	110	— <i>d.</i> Griffith <i>v.</i> Pritchard ..	91
— <i>d.</i> Nethercote <i>v.</i> Bartle ..	442	— <i>d.</i> Hayne and his Majesty	
— <i>d.</i> Robinson <i>v.</i> Bousfield ..	419	<i>v.</i> Redfern	157
— <i>d.</i> Spilsbury, Burdett <i>v.</i> ..	347	— <i>d.</i> Pearson <i>v.</i> Ries	459
— <i>d.</i> Grubb <i>v.</i> Earl of Bur-		— <i>d.</i> Dixon <i>v.</i> Roe	294
lington	419	— <i>d.</i> Lumley <i>v.</i> Earl of Scar-	
— <i>d.</i> Wyatt <i>v.</i> Byron	295	borough	326
— <i>d.</i> Tatum <i>v.</i> Catomore ..	180	— <i>d.</i> Foster <i>v.</i> Scott	423
— <i>d.</i> Evers, Challis <i>v.</i>	324	— <i>d.</i> Strode <i>v.</i> Seaton	461
— <i>d.</i> Spencer <i>v.</i> Clark	426	— <i>d.</i> Blesard <i>v.</i> Simpson ..	426
— <i>v.</i> Clarke	319	— <i>d.</i> Molesworth <i>v.</i> Sleeman	626
— <i>d.</i> Hurst <i>v.</i> Clifton	505	— <i>d.</i> Clarke <i>v.</i> Smaridge ..	457
— <i>d.</i> Were <i>v.</i> Cole	218, 292	— <i>d.</i> Gutteridge <i>v.</i> Sowerby	441
— <i>d.</i> Clements <i>v.</i> Collins ..	17	— <i>d.</i> Shaw <i>v.</i> Steward	479
— <i>d.</i> Earl of Egremont <i>v.</i>		— <i>d.</i> Reyer <i>v.</i> Strickland ..	438
Courtenay	480	— <i>d.</i> Reed <i>v.</i> Taylor	173
— <i>d.</i> Bastow <i>v.</i> Cox	455	— <i>d.</i> Lord Downe <i>v.</i> Thomp-	
— <i>d.</i> Cook <i>v.</i> Danvers	420	son	502
— <i>d.</i> Dixie <i>v.</i> Davies	455	— <i>d.</i> Tofield <i>v.</i> Tofield	440
— <i>d.</i> Parsley <i>v.</i> Day	501	— <i>d.</i> Bover <i>v.</i> Trueman	443
— <i>d.</i> Crosthwaite <i>v.</i> Dixon ..	129	— <i>d.</i> Lord Bradford <i>v.</i> Wat-	
— <i>d.</i> Curzon <i>v.</i> Edmonds ..	550	kins	456
— <i>d.</i> Poole <i>v.</i> Errington ..	16	— <i>d.</i> Leach <i>v.</i> Whittaker ..	441
— <i>d.</i> Bloomfield <i>v.</i> Eyre	349	— <i>d.</i> Gregory <i>v.</i> Whichelo	130,
— <i>d.</i> Garrod <i>v.</i> Garrod	412	595, 604	
— <i>d.</i> Davies <i>v.</i> Gatacre	329	— <i>d.</i> Perry <i>v.</i> Wilson	430
— <i>d.</i> Fisher <i>v.</i> Giles	504	— <i>d.</i> Daniell <i>v.</i> Woodroffe ..	244
— <i>d.</i> Muston <i>v.</i> Gladwin ..	467	Dolman, Cox <i>v.</i>	550
— <i>d.</i> Walker <i>v.</i> Groves	459	Donegall, Marquis of, Chiches-	
— <i>d.</i> Riddell <i>v.</i> Gwinnell ..	451	ter <i>v.</i>	559
— <i>d.</i> Harris <i>v.</i> Howell	342	Donne <i>v.</i> Hart	479
— <i>d.</i> Reay <i>v.</i> Huntingdon ..	420	Dowman's case	33
— <i>d.</i> Baker <i>v.</i> Jones	467	Downing College, Flack <i>v.</i> ..	449
— <i>d.</i> Duroure <i>v.</i> Jones	88	Downshire, Marquis of, <i>v.</i> Lady	
— <i>d.</i> Wigan <i>v.</i> Jones	352	Sandys	33
— <i>d.</i> Barrett <i>v.</i> Kemp	379	Drake, Souter <i>v.</i>	540
— <i>d.</i> Garnons <i>v.</i> Knight ..	179	Drybutter <i>v.</i> Bartholomew ..	9
— <i>d.</i> Winder <i>v.</i> Lawes ..	440, 447	Duberley <i>v.</i> Day	479
— <i>d.</i> De Rutzen <i>v.</i> Lewis ..	468	Dugdale <i>v.</i> Robertson	18
— <i>d.</i> Roylance <i>v.</i> Lightfoot	501	Du Hourmelin <i>v.</i> Sheldon	198
— <i>d.</i> Johnson <i>v.</i> Liversedge	550	Duke, Sheppard <i>v.</i>	552
— <i>d.</i> Lushington <i>v.</i> Bishop		Dumpor's case	322, 465
of Llandaff	401	Dungannon, Lord, Ker <i>v.</i>	373
— <i>d.</i> Roby <i>v.</i> Maisey	504	Dunne <i>v.</i> Dunne	47

	PAGE		
<i>t. Davison</i>	481	<i>Grugeon v. Gerrard</i>	47
<i>v. Harrison</i>	31	<i>Gubbins, Coppinger v.</i>	8
<i>Gerrard, Grugeon v.</i>		<i>Guest v. Cowbridge Railway</i>	
<i>Gibbons, Brackenbury v.</i>	320	<i>Company</i>	112
	445	<i>Gunston, In the goods of</i>	246
<i>Gibbs, Wells v.</i>	110	<i>Gurney v. Gurney</i>	249
<i>Gibson, Thibault v.</i>		<i>Gwinnell, Doe d. Riddell v.</i>	451
<i>Giddings v. Giddings</i>	481	<i>Gyde, Lingwood v.</i>	435
<i>Giles, Doe d. Fisher v.</i>	504		
<i>Gillam, Golden v.</i>	102	<i>Hackett, Legg v.</i>	457
<i>Gimson, Worthington v.</i>	381	<i>Hadfield's case</i>	220
<i>Gladwin, Doe d. Muston v.</i>	467	<i>Hadleston v. Whelpdale</i>	481
<i>Glass, Murphy v.</i>	212	<i>Haggerston v. Hanbury</i>	242
<i>— v. Richardson</i>	449	<i>Haigh, Ex parte</i>	515
<i>Glasscock, Smith v.</i>	467	<i>Haines v. Welch</i>	38
<i>Gleaves v. Paine</i>	267	<i>Hale v. Pew</i>	325
<i>Glegg, Ex parte</i>	474	<i>Halford v. Stains</i>	372
<i>Glover, Aynsley v.</i>	555	<i>Hall v. Bainbridge</i>	179
<i>Glyn, Attorney-General v.</i>	97	<i>— v. Byron</i>	376, 605
<i>Goddard v. Complin</i>	523	<i>— v. Chandless</i>	180
<i>Golden v. Gillam</i>	102	<i>— Keech v.</i>	504
<i>Goodman, Cooch v.</i>	184	<i>— Price v.</i>	320, 331
<i>Goodright d. Burton v. Rigby</i>	69	<i>— v. Waterhouse</i>	269
<i>Goold, M'Carthy v.</i>	120	<i>Hallett, Attorney-General v.</i>	337
<i>— v. White</i>	427	<i>Hamer, Dickin v.</i>	282
<i>Gordon v. Graham</i>	526	<i>Hamilton, Attorney-General v.</i>	168
<i>— v. Whieldon</i>	272	<i>Hampstead Junction Railway</i>	
<i>Gostling, Baker v.</i>	478	<i>Company, Lord Grosvenor v.</i>	17
<i>Gower, Yellowly v.</i>	30	<i>Hampton v. Holman</i>	325
<i>Grafton, case of Duke of</i>	76	<i>Hanbury, Haggerston v.</i>	242
<i>Graham, Gordon v.</i>	526	<i>Handcock, Jolly v.</i>	280
<i>— v. Graham</i>	180	<i>Hanson, Eyre v.</i>	508
<i>Grand Junction Canal Com-</i>		<i>— v. Keating</i>	479
<i>pany, Dimes v.</i>	444	<i>Harcourt, Ainslie v.</i>	481
<i>Grange, Hill v.</i>	610	<i>Harding v. Harding</i>	521
<i>Grant, Ex parte</i>	27	<i>— Smalley v.</i>	474
<i>— v. Mills</i>	515	<i>— c. Wilson</i>	381
<i>Granville, Eardley v.</i>	418	<i>Hardinge, Thompson v.</i>	420
<i>Graves v. Weld</i>	38, 455	<i>Hare v. Burges</i>	480
<i>Gray, Flight v.</i>	212	<i>Hargreaves, Scholes v.</i>	615
<i>Grazebrook, Rogers v.</i>	501	<i>Harlock v. Ashberry</i>	553
<i>Greaves v. Greenwood</i>	135	<i>Harnett v. Maitland</i>	455
<i>— v. Tofield</i>	384	<i>Harrington v. Price</i>	573
<i>— v. Wilson</i>	518	<i>Harris v. Pugh</i>	205
<i>Green v. James</i>	502	<i>Harris's Settled Estates, Re.</i>	266
<i>— Miller v.</i>	386, 460	<i>Harrison v. Blackburn</i>	220
<i>— Re</i>	473	<i>— Gent v.</i>	31
<i>Greenwood v. Evans</i>	481	<i>— Norris v.</i>	39
<i>— Greaves v.</i>	135	<i>— Rooper v.</i>	398, 580
<i>Grey, Pickersgill v.</i>	447	<i>Hart, Donne v.</i>	479
<i>Griffith v. Blunt</i>	369	<i>— Rolland v.</i>	232, 524
<i>— Wynne v.</i>	351	<i>Harvey, Jenkins v.</i>	555
<i>Griffiths v. Gale</i>	254	<i>— Reed v.</i>	474
<i>Grose v. West</i>	379	<i>Harvey's Settled Estates, Re.</i>	48
<i>Grosvenor (Lord) v. Hampstead</i>		<i>Harter v. Colman</i>	527, 522
<i>Junction Railway Company</i>	17		
<i>Groves, Doe d. Walker v.</i>	459		
<i>Grubb, Barkshire v.</i>	381, 579		

INDEX TO CASES CITED.

	PAGE
Johnson, Re, Golden <i>v.</i> Gillam	102
Johnston, Salkeld <i>v.</i>	552
Joliffe, Rex <i>v.</i>	555
Jolly <i>v.</i> Handcock	280
Jones, Ashton <i>v.</i>	97
— <i>v.</i> Davies	490
— Doe <i>d.</i> Baker <i>v.</i>	467
— Doe <i>d.</i> Duroure <i>v.</i>	88
— Doe <i>d.</i> Wigan <i>v.</i>	352
— <i>v.</i> Jones	285, 481, 522
— Pitt <i>v.</i>	170
— <i>v.</i> Robin	625
— Roe <i>d.</i> Perry <i>v.</i>	326
— <i>v.</i> Smith	515, 527
— <i>v.</i> Tripp	526
— <i>v.</i> Williams	110
— Youle <i>v.</i>	226
— Re	54
Joze <i>v.</i> Morshead	433
Jordan, Jennings <i>v.</i>	528
— Whitbread <i>v.</i>	515
Joseph <i>v.</i> Lyons	194

K.

Kay <i>v.</i> Oxley	381, 579
Keating, Hanson <i>v.</i>	479
Keech <i>v.</i> Hall	504
Kelson, Watts <i>v.</i>	381, 579
Kemp, Doe <i>d.</i> Barrett <i>v.</i>	379
Kennard <i>v.</i> Futvoye	522
Kenworthy <i>v.</i> Ward	165
Keppel <i>v.</i> Bailey	463
Ker <i>v.</i> Lord Dungannon	373
Kerr <i>v.</i> Pawson	435
Kettlewell <i>v.</i> Watson	524
Kilpin, Wells <i>v.</i>	112
King, The, <i>v.</i> Lord of the Manor of Oundle	449
— <i>v.</i> Lord Yarborough	380
King <i>v.</i> Smith	115, 205
— <i>v.</i> Turner	430
— Vanderplank <i>v.</i>	325
Kingham, Chambers <i>v.</i>	490
Kinnoul, Earl of, Hinchcliffe <i>v.</i>	381
Kinsman <i>v.</i> Rouse	552
Kite and Queinton's case	440
Knatshbull's Settled Estate, Re	43
— Light, Doe <i>d.</i> Garnons <i>v.</i> ..	179
— Lowles, Stroyan <i>v.</i>	18

L.

— <i>v.</i> Hill	285, 450
— bury, Ex parte	474
— Lurgas <i>v.</i>	—

	PAGE
Lambert, Carr <i>v.</i>	615
Lampet's case	326
Lane <i>v.</i> Jackson	111
— and Pers, Eylet <i>v.</i>	425
— Thomas <i>v.</i>	17
Langford <i>v.</i> Selmes	477, 478
Lansley, Major <i>v.</i>	268
Law <i>v.</i> Urlwin	490
Lawes, Doe <i>d.</i> Winder <i>v.</i>	440, 447
Lawrie <i>v.</i> Lees	184
Leak, Melling <i>v.</i>	455
Leathes <i>v.</i> Leathes	558
Lechmere and Lloyd, Re	342
Leeds, Duke of, <i>v.</i> Earl Amherst	33
Lees, Lawrie <i>v.</i>	184
Le Fleming, Shuttleworth <i>v.</i> .	555
Legg <i>v.</i> Hackett	457
— <i>v.</i> Strudwick	457
Leigh <i>v.</i> Jack	379
Leighton, Carleton <i>v.</i>	327
— <i>v.</i> Price	55
Leman, Minet <i>v.</i>	377
Le Neve <i>v.</i> Le Neve	232
Leon, Rollason <i>v.</i>	458
Lester <i>v.</i> Garland	120
Lewin <i>v.</i> Lewin	138, 591
Lewis, Doe <i>d.</i> Rutzen <i>v.</i>	468
— <i>v.</i> John	515
Liddell, Barrington <i>v.</i>	372
Lidderdale <i>v.</i> Montrose (Duke of)	120
Lightfoot, Doe <i>d.</i> Roylance <i>v.</i>	501
— Menzies <i>v.</i>	526
Lightowler, Crossley <i>v.</i>	557
Lincoln, Bishop of, Bennett <i>v.</i>	399
— Walsh <i>v.</i>	399
Lingen, Re	27
Lingwood <i>v.</i> Gyde	435
Lisle, White <i>v.</i>	625
Lister, Melwich <i>v.</i>	415
— Tidd <i>v.</i>	267
Littledale, Att.-Gen. <i>v.</i>	336
Liversedge, Doe <i>d.</i> Johnson <i>v.</i>	558
Llandaff, Bishop of, Doe <i>d.</i> Lushington <i>v.</i>	401
Llewellyn, Lord Dunraven <i>v.</i>	146, 378, 605, 616, 618, 620, 624, 625, 627
— <i>v.</i> Rous	40
Lloyd <i>v.</i> Cheetham	120
Lock <i>v.</i> De Burgh	39
Lockyer <i>v.</i> Savage	119
Long <i>v.</i> Blackall	369
— <i>v.</i> Storie	120
Lopes, Porter <i>v.</i>	170
Lord <i>v.</i> The Commissioners for the City of Sydney	379
Love <i>v.</i> Bell	18

	PAGE		PAGE
Lovejoy, Cheese <i>v.</i>	250	Meakin, Doe <i>d.</i> Biddulph <i>v.</i> ...	18
Lowe <i>v.</i> Chester, Bishop of ..	399	Melling <i>v.</i> Leak	455
— Faulkner <i>v.</i>	225	Mellor <i>v.</i> Spateman	606, 609
Lowndes <i>v.</i> Norton	31	Melwich <i>v.</i> Lister	415
Lowrey <i>v.</i> Barker	474	Menzies <i>v.</i> Lightfoot	526
Lucas <i>v.</i> Brandreth	24	Mercer and Moore, Re	393
— <i>v.</i> Dennison	552	Merry, Day <i>v.</i>	33
Lucena <i>v.</i> Lucena	348	Merryweather, Saunders <i>v.</i> ..	502
Luck, Beevor <i>v.</i>	529	Mestayer <i>v.</i> Biggs	383
Lucy, Campbell <i>v.</i>	250	Metcalfe's trusts, Re	29
Lukin, Curtis <i>v.</i>	373	Meux, Baggott <i>v.</i>	269
Lumley, Lord Ward <i>v.</i>	180	Micklethwait, Astley <i>v.</i>	334
Lyon <i>v.</i> Reed	481	— <i>v.</i> Micklethwait	33
Lyons, Joseph <i>v.</i>	194	Mid Kent Railway, Re, Ex	
		parte Styau	320
		Middleton, Lord, Attorney-	
		General <i>v.</i>	335
		Mildmay, Rex <i>v.</i>	440
		Mill, Hiern <i>v.</i>	117
		Miller <i>v.</i> Green	386, 460
		Millership <i>v.</i> Brookes	180
		Mills, Curling <i>v.</i>	458
		— Grant <i>v.</i>	515
		— Paterson <i>v.</i>	598
		— <i>v.</i> Trumper	40
		Mines Royal Societies <i>v.</i> Mag-	
		nay	212
		Minet <i>v.</i> Leman	377
		Minshull <i>v.</i> Oakes	462
		Minton, Francis <i>v.</i>	580
		Mogg <i>v.</i> Mogg	319
		Moleyn's, Sir John de, case ..	109
		Mollett, Tidy <i>v.</i>	458
		Montrose, Duke of, Liddar-	
		dale <i>v.</i>	120
		Monypenny <i>v.</i> Dering	323, 325
		Moore, Follett <i>v.</i>	516
		— Pollexfen <i>v.</i>	515
		— <i>v.</i> Rawson	557
		— <i>v.</i> Webster	275
		Moorhouse, Allcock <i>v.</i>	297, 456
		Moorsom, Neame <i>v.</i>	580
		Morecock <i>v.</i> Dickins	524
		Morgan, Corder <i>v.</i>	510
		— <i>v.</i> Hatchell	153
		— <i>v.</i> Swansea Urban Sani-	
		tary Authority	141
		Morrell, Scoones <i>v.</i>	379
		Morris, Lord Aylesford <i>v.</i>	559
		— Bickett <i>v.</i>	379
		— <i>v.</i> Morris	38
		Morse, Sturgis <i>v.</i>	551
		Morshead, Jope <i>v.</i>	483
		Morton, Smart <i>v.</i>	18
		Mostyn <i>v.</i> The West Mostyn	
		Coal and Iron Company,	
		Limited	532
		Motley, Andrew <i>v.</i>	

M.

M'Carthy <i>v.</i> Goold	120
M'Culloch, Russell <i>v.</i>	518
Macdonald, Cooper <i>v.</i>	275, 277
M'Donnell <i>v.</i> Pope	481
M'Gregor <i>v.</i> M'Gregor	165
Machell <i>v.</i> Weeding	257
Mackintosh <i>v.</i> Barber	363
Mackreth <i>v.</i> Symmons	515
Macleau, Bowser <i>v.</i>	418
Macpherson, Brummell <i>v.</i>	465
Magnay, Mines Royal So-	
cieties <i>v.</i>	212
Mainwaring <i>v.</i> Baxter	73
Maisey, Doe <i>d.</i> Robey <i>v.</i>	504
Maitland, Harnett <i>v.</i>	455
Major <i>v.</i> Lansley	268
Majoribanks <i>v.</i> Hovenden ..	346
Mander <i>v.</i> Harris	274
Mandeville's case	313
Manners <i>v.</i> Charlesworth	168
March, Re	274
Marjoribanks, Nairn <i>v.</i>	47
Marks <i>v.</i> Marks	326
Marlborough, Duchess of,	
Brace <i>v.</i>	109, 523
Marston <i>v.</i> Roe <i>d.</i> Fox	250
Martin <i>v.</i> Swannell	258
Martyn, Doe <i>d.</i> Brune <i>v.</i>	175
— <i>v.</i> Williams	463
Massey, Egerton <i>v.</i>	315, 331
Mathew <i>v.</i> Blackmore	520
Matthew <i>v.</i> Bowler	515
Matthews, Clements <i>v.</i>	194
— Smith <i>v.</i>	267
Maundrell <i>v.</i> Maundrell	351
Mawson, Barnes <i>v.</i>	626
May, Iggulden <i>v.</i>	480
Mead, Garland <i>v.</i>	442
Meads, Taylor <i>v.</i>	269

	PAGE
Muggleton v. Barnett....	589

Muscott, Doe d. Twining v.	
----------------------------	--

N.

Nairn v. Marjoribanks	47
Nanny v. Edwards	508
Nash v. Flyn	180
—— Watkins v.	180
Neame v. Moorsom	580
Nepean v. Doe	549
Neve v. Pennell	523, 524
Newcombe, Turvin v.	373
Newman v. Newman	369
—— v. Selfe	509
New River Company, Davall v	198
Newton v. Ricketts	347
Nickells v. Atherstone	481
Nicloson v. Wordsworth..	122, 259
Nixon, Scott v.	553
Noble, Fry v.	286, 353
Noel v. Bewley	331
Noke's case	532
Norris v. Harrison	39
—— Robertson v.	267
North London Freehold Land and House Company v. Jacques	471
North, Potter v.	626
—— Smyth v.	474
Norton, Lowndes v.	31
—— Simmons v.	30
Norwood, Crump d. Woolley v.	159

O.

Oates, Minshull v.	462
Oates d. Hatterley v. Jackson	165
Odum, Flarty v.	100
Oldknow, Isherwood v.	
Oliver, Doe d. Christmas v. ..	326
Onslow, Pope v.	527
Orme's case	192
O'Rorke v. Bolingbroke	559
Oundle, Lord of Manor of, The King v.	449
Ovington, Christie v.	141
Owen, Re	27
—— De Beauvoir v.	553
Oxford, Earl of, Beavan v.	111
Oxley v. Kay	

P.

Padget, Vint v.	528
Page, Wilson v.	628
Pain, Ridout v.	8
Paine, Gleaves v.	267
Paine's case	637
Palmer, Cadell v.	73, 369
—— v. Edwards	477
Parker v. Carter	
—— Colville v.	103
—— v. Dee	106
—— v. Taswell	458
Parmenter v. Webber	477
Parratt, Doe d. Freestone v...	273
Parsons, Zouch v.	89
Pascoe v. Pascoe	477, 478
Pass, Dennett v.	391
Passingham, Doe d. Lloyd v...	192
—— app., Pitty, resp.	152, 221
Pate v. Brownlow	615
Paterson v. Mills	598
Patrick, Shedden v.	88
Patterson, Forster v.	552
Pattishul's case	415
Pawson, Kerr v.	435
Paxton, Cholmeley v.	33
Payne v. Barker	589
Peach, Doe d. Mansfield v. ..	346
Peacock v. Eastland	78
—— Whitton v.	502
Pearce v. Cheslyn	459
Pearse, Heatman v.	370
Pearsey, Doe d. Pring v.	379
Pearson, Brooke v.	120
—— Elder v.	479
Peck, Doe d. Flower v.	467
Pedley, Haslick v.	40
Pemberton, Wortham v.	267
Pennell, Neve v.	523, 524
Penrhyn, Lord, Dawkins v. ..	68
Pepler, Taunton v.	184
Peppercorn v. Wayman	448
Perceval v. Perceval	320, 331
Perrin v. Blake	255, 304
Perryman's case	421
Pett, Doe d. Blight v.	490
Pettitt, Stratton v.	458
Petty v. Styward	517
Pew, Hale v.	325
Pheyséy v. Vicary ...	381
Phillips, Freeman v.	626
Phillips, Acocks v.	294
—— Cousins v.	298
—— Duke of Beaufort v. ..	110
—— v. Phillips	442
—— v. Smith	30

	PAGE		
Phipps <i>v.</i> Lord Enuismore ..	120	Q.	
Pickersgill <i>v.</i> Grey	447	Queen, The <i>v.</i> Chorley	557
Pidgeley <i>v.</i> Rawling	30	—— <i>v.</i> Corbett	449
Pignet, Anderson <i>v.</i>	287, 495	—— <i>v.</i> Lady of Manor of	
Pigot's case	180	Dallingham	447
Pike, Wilmot <i>v.</i>	522	—— <i>v.</i> Gee	380
Pilling's Trusts, Re	142, 165,	—— <i>v.</i> Wilson	449
	200, 263	Queen's College, Warrick <i>v.</i>	376,
Pincke, Shove <i>v.</i>	242		555, 605
Pitt <i>v.</i> Jackson	325	Queinton, case of Kite and ..	440
—— <i>v.</i> Jones	170		
Pitty, resp., Passingham, app.	152,		
	423		
Plant, James <i>v.</i>	381	R.	
Plummer <i>v.</i> Whiteley	40	Rabbits, Wiltshire <i>v.</i>	522
Pocknell, Buckland <i>v.</i>	515	Ralph <i>v.</i> Carrick	373
Pollexfen <i>v.</i> Moore	515	Randfield <i>v.</i> Randfield	447
Pollock <i>v.</i> Stacy	477	Rann <i>v.</i> Hughes	179
Pomfret, Earl of, <i>v.</i> Lord		Rawe <i>v.</i> Chichester	481
Windsor	455	Rawley <i>v.</i> Holland	364
—— Selby <i>v.</i>	527	Rawling, Pidgeley <i>v.</i>	30
Pontifex, Doe <i>d.</i> Church <i>v.</i> ..	383	Rawson, Moore <i>v.</i>	557
Poole <i>v.</i> Bentley	459	Ray <i>v.</i> Pung	352
—— Doe <i>d.</i> Biddulph <i>v.</i>	480	Rayer, Purvis <i>v.</i>	540
Pope, M'Donnell <i>v.</i>	481	Redfern, Doe <i>d.</i> Hayne and His	
—— <i>v.</i> Onslow	527	Majesty <i>v.</i>	157
Portal and Lamb, Re	252	Reed <i>v.</i> Harvey	474
Porter <i>v.</i> Lopes	170	—— Lyon <i>v.</i>	481
Portington's, Mary, case	68	Reeve, Bennett <i>v.</i>	606, 609
Portland, Duke of, <i>v.</i> Hill	420	Regina <i>v.</i> Lady of Manor of	
Potter, Credland <i>v.</i>	524	Dallingham	447
—— <i>v.</i> North	626	Remnant, Hunt <i>v.</i>	580
Poultney <i>v.</i> Holmes	477	Rendall, Dyke <i>v.</i>	285
Powell, Pritchard <i>v.</i>	608, 625	Rex <i>v.</i> Jolliffe	555
Powys <i>v.</i> Blagrove	30	—— <i>v.</i> Mildmay, Dame Jane	
Prat <i>v.</i> Colt	203	St. John	440
Preece <i>v.</i> Corrie	477	—— <i>v.</i> Oundle, Lord of Manor	
Prescott <i>v.</i> Barker	473	of	449
—— Holmes <i>v.</i>	320	—— <i>v.</i> Lord Yarborough	380
Price, Re, Leighton <i>v.</i> Price ..	55	Reynolds <i>v.</i> Wright	389
—— Curtis <i>v.</i>	310	Rhodes, Barlow <i>v.</i>	381
—— <i>v.</i> Hall	320, 331	—— <i>v.</i> Whitehead	320
—— Harrington <i>v.</i>	573	Richardson, Cottee <i>v.</i>	477
—— <i>v.</i> Worwood	467	—— Glass <i>v.</i>	449
Prickett, Steel <i>v.</i>	379, 626	—— Walker <i>v.</i>	97
Prince, Doe <i>d.</i> Starling <i>v.</i>	244	Riches, Bradley <i>v.</i>	524
Pritchard, Doe <i>d.</i> Griffith <i>v.</i> ...	91	Rickett's trusts, Re	347
—— <i>v.</i> Powell	608, 625	Ricketts, Newton <i>v.</i>	347
—— Shaw <i>v.</i>	120	Riddell <i>v.</i> Riddell	533
Procter, Bacon <i>v.</i>	372	Rider <i>v.</i> Wood	160, 589
—— <i>v.</i> Cooper	524	Ridout <i>v.</i> Pain	8
Protheroe, Damerell <i>v.</i> ..	433, 625	Ries, Doe <i>d.</i> Pearson <i>v.</i>	459
Provost of Beverley's case	308	Rigby, Goodright <i>d.</i> Burton <i>v.</i>	69
Pugh, Harris <i>v.</i>	205	Right <i>d.</i> Taylor <i>v.</i> Banks	430
—— Heath <i>v.</i>	508, 553	—— <i>d.</i> Flower <i>v.</i> Darby ..	455, 456
Pung, Ray <i>v.</i>	352	Riley <i>v.</i> Garnett	320
Purvis <i>v.</i> Rayer	540	Rittson <i>v.</i> Stordy	198

INDEX TO CASES CITED.

	PAGE
Rivis <i>v.</i> Watson	393
Roach <i>v.</i> Wadham	351
Robertson, Dugdale <i>v.</i>	18
———— <i>v.</i> Norris	267
Robey, Trulock <i>v.</i>	552
Robin, Jones <i>v.</i>	625
Robinson, Barnes <i>v.</i>	267
———— Brandon <i>v.</i> ...119, 120, 268	
———— Buttery <i>v.</i>	386
Roe <i>d.</i> Earl of Berkeley <i>v.</i> Archbishop of York	480
—— Doe <i>d.</i> Dixon <i>v.</i>	294
—— <i>d.</i> Fox, Marston <i>v.</i>	250
—— <i>d.</i> Perry <i>v.</i> Jones	326
Rogers <i>v.</i> Grazebrook.....	501
—— <i>v.</i> Taylor.....	18
Rolland <i>v.</i> Hart	232, 524
Rollason <i>v.</i> Leon	458
Rolph, Barrett <i>v.</i>	478
Rolt <i>v.</i> Hopkinson	526
Romilly <i>v.</i> James	338
Rooper <i>v.</i> Harrison	398, 580
Rose <i>v.</i> Bartlett	473
Rosling, Bond <i>v.</i>	458
Rosslyn's, Re Lady, Trust ..	373
Rous, Llewellyn <i>v.</i>	40
Rouse, Kinsman <i>v.</i>	552
Rowbotham <i>v.</i> Wilson	18
Rowe, Calmady <i>v.</i>	380
Rowland <i>v.</i> Cuthbertson	285
Rowley <i>v.</i> Adams	463
—— Appleton <i>v.</i>	275
Royle, Ash <i>v.</i>	415
Rudall, Warren <i>v.</i>	30
Russell Road PurchaseMoneys, Re	524
—— <i>v.</i> M'Culloch	518
—— <i>v.</i> Russell.....	515
—— Webb <i>v.</i>	298

S.

Sabine, Bellamy <i>v.</i>	117
St. Albans, Duke of, <i>v.</i> Skip- with	30
St. Leonards, Lord, Sugden <i>v.</i>	250
St. Sauveur, Sharp <i>v.</i>	89, 198
Salisbury, Marquis of, Beau- mont <i>v.</i>	477
Salkeld, Johnston <i>v.</i>	552
Salt <i>v.</i> Cooper	113
Sandaman, Clements <i>v.</i>	123
Sanders <i>v.</i> Sanders	550
Sanderson, Wright <i>v.</i>	246
Sands to Thompson	553
Sandys, Lady, Marquis of Downshire <i>v.</i>	33

	PAGE
Saunders, Hill <i>v.</i>	461
———— <i>v.</i> Merryweather ..	502
Savage, Adams <i>v.</i>	364
—— Lockyer <i>v.</i>	119
Saward <i>v.</i> Anstey	386
Sayers <i>v.</i> Collier	213
Scarborough <i>v.</i> Borman ..	120, 268
—— Earl of, Doe <i>d.</i> Lumley <i>v.</i>	326
Scarisbrick <i>v.</i> Skelmersdale ..	373
Scholes <i>v.</i> Hargreaves	615
Scoones <i>v.</i> Morrell	379
Scott, Berrington <i>v.</i>	76
—— Exton <i>v.</i>	179
—— Doe <i>d.</i> Foster <i>v.</i>	423
—— <i>v.</i> Nixon	553
Scratton <i>v.</i> Brown	380
Seaton, Doe <i>d.</i> Strode <i>v.</i>	461
Seaward <i>v.</i> Willock	325
Sebright, Baker <i>v.</i>	33
Sefton, Earl of, Att.-Gen. <i>v.</i> ..	336
—— <i>v.</i> Court	610
Selby <i>v.</i> Pomfret	527
Selfe, Newman <i>v.</i>	509
Selmes, Langford <i>v.</i>	477, 478
Sewell, Cole <i>v.</i>	323
Sharp <i>v.</i> St. Sauveur.....	89, 198
Sharpe, Clay <i>v.</i>	510
Shaw <i>v.</i> Johnson.....	495
—— <i>v.</i> Pritchard.....	120
Shedden <i>v.</i> Patrick.....	88
Sheldon, Du Hourmelin <i>v.</i> ..	198
Shelley's case.. 303, 305, 309, 310, 313	
Sheppard <i>v.</i> Duke	552
Shove <i>v.</i> Pincke	242
Shrapnell <i>v.</i> Blake	512
Shum, Taylor <i>v.</i>	463
Shuttleworth <i>v.</i> Le Fleming..	555
Sibthorpe, Attorney-General <i>v.</i>	335
Siggers <i>v.</i> Evans.....	259
Simmons <i>v.</i> Norton.....	30
Simpson, Doe <i>d.</i> Blesard <i>v.</i> ..	425
—— <i>v.</i> Dendy	379
Sims <i>v.</i> Thomas	206
Sitwell, Attorney-General <i>v.</i> ..	398
Skelmersdale, Scarisbrick <i>v.</i> ..	373
Skipwith, Duke of St. Albans <i>v.</i>	30
Slater, Spencer <i>v.</i>	102
Sleeman, Doe <i>d.</i> Molesworth <i>v.</i>	626
Smalley <i>v.</i> Harding	474
Smaridge, Doe <i>d.</i> Clarke <i>v.</i> ..	457
Smart, Re.....	413, 430
—— Gee <i>v.</i>	212
—— <i>v.</i> Morton	18
Smith, Ackroyd <i>v.</i>	381
—— <i>v.</i> Adams.....	451
—— Booth <i>v.</i>	391

INDEX TO CASES CITED.

xxx

	PAGE
<i>Trower v. Butts</i>	319
<i>Trueman, Doe & Bover v.</i>	443
<i>Trulock v. Robey</i>	552
<i>Trumper, Mills v.</i>	40
<i>Trye, Lord Aldborough v.</i> ..	559
<i>Tuck, Edwards v.</i>	372
<i>Tullett v. Armstrong</i>	120, 268
<i>Tunstall v. Boothby</i>	120
<i>Turner, Chadwick v.</i>	264
<i>v.</i>	480
<i>Turvin v. Newcombe</i>	373
<i>Tutton v. Darke</i>	294
<i>Twyne's case</i>	102
<i>Tyrringham's case</i> ..	615, 617, 618

U.

<i>Union Bank of London v.</i>	
<i>Ingram</i>	516
<i>Upton v. Bassett</i>	103
<i>— Welcome v.</i>	555
<i>Urch v. Walker</i>	259
<i>Urlwin, Law v.</i>	490

V.

<i>Vanderplank v. King</i>	325
<i>Vane v. Vane</i>	551
<i>Vaughan, Viner v.</i>	31
<i>Vicary, Pheysey v.</i>	381
<i>Vickers v. Cowell</i>	517
<i>Vincent v. Bishop of Sodor and</i>	
<i>Man</i>	346
<i>Viner v. Vaughan</i>	31
<i>Vint v. Padget</i>	528
<i>Vivian, Jenkin v.</i>	616
<i>Vize, Wrixon v.</i>	553
<i>Voss, Re</i>	270
<i>Vyvyan v. Arthur</i>	463

W.

<i>Wadham, Roach v.</i>	351
<i>Wadkin, Barrow v.</i>	198
<i>Wainwright v. Elwell</i>	442
<i>Wakeford, Wright v.</i>	346
<i>Waldo v. Waldo</i>	31, 33
<i>Wale v. Commissioners of In-</i>	
<i>land Revenue</i>	519
<i>Walker, Allen v.</i>	212
<i>— v. Richardson</i>	97
<i>— Urch v.</i>	259
<i>— Wheelwright v.</i>	49
<i>— Woodhouse v.</i>	30
<i>Wallahi, Wilson v.</i>	474

	PAGE
<i>Walsh v. Bishop of Lincoln</i> ..	399
<i>Walton, Ex parte</i>	474
<i>Ward, Berridge v.</i>	379
<i>— Kenworthy v.</i>	165
<i>— Lord, v. Lumley</i>	180
<i>Warde, Bristow v.</i>	325
<i>Wardle v. Brocklehurst</i>	381
<i>Ware v. Cann</i>	24
<i>Warman v. Faithfull</i>	459
<i>Warren, Hutton v.</i>	482
<i>— v. Rudall</i>	30
<i>Warrick v. Queen's College</i> ..	376,
	555, 605
<i>Waterhouse, Hall v.</i>	269
<i>Watkins, Doe & Lord Brad-</i>	
<i>ford v.</i>	456
<i>— v. Nash</i>	180
<i>Watson, Kettlewell v.</i>	524
<i>— Ravis v.</i>	393
<i>Watts v. Kelson</i>	381, 579
<i>— Smith v.</i>	478
<i>Wayman, Peppercorn v.</i>	448
<i>Webb v. Austin</i>	461
<i>— v. Russell</i>	298
<i>Webber, Parmenter v.</i>	477
<i>Weber, Fitch v.</i>	88
<i>Webster, Moore v.</i>	275
<i>Weeding, Machell v.</i>	257
<i>Weeks v. Sparke</i>	608
<i>Welch, Haines v.</i>	38
<i>Welcome v. Upton</i>	555
<i>Weld, Graves v.</i>	38, 455
<i>Welden v. Bridgwater</i>	615
<i>Wellesley, Earl Cowley v.</i>	30
<i>— v. Wellesley</i>	33
<i>Wells v. Gibbs</i>	110
<i>— v. Kilpin</i>	112
<i>Wescombe, Davies v.</i>	33
<i>West, Grose v.</i>	379
<i>West London and Crystal</i>	
<i>Palace Railway Company,</i>	
<i>Cole v.</i>	17
<i>West Mostyn Coal and Iron</i>	
<i>Company, Limited, Mostyn v.</i>	532
<i>Westbrook v. Blythe</i>	474
<i>Whalley, Ex parte</i>	27
<i>Wheate, Burgess v.</i>	24, 198
<i>Wheelwright v. Walker</i>	49
<i>Whelpdale, Hadleston v.</i>	481
<i>Whichelo, Doe & Gregory v.</i> ...	180,
	535, 604
<i>Whieldon, Gordon v.</i>	272
<i>Whisson, Aveline v.</i>	184
<i>Whitbread v. Jordan</i>	515
<i>White, Baker v.</i>	259
<i>— Dixon v.</i>	18
<i>— Goold v.</i>	427
<i>— Hillacre</i>	527

[illegible]

INDEX TO CASES CITED.

	PAGE
Trower v. Butts	319
Tyneman, Doe d. Bover v.....	443
Trulock v. Robey	552
Trumper, Mills v.	40
Trye, Lord Aldborough v. ..	559
Tuck, Edwards v.	372
Tullett v. Armstrong.....	120, 268
Tunstall v. Boothby	120
Turner, Chadwick v.	264
—— King v.	430
Turvin v. Newcombe	373
Tutton v. Darke	294
Twyne's case	102
Tyrringham's case ..	615, 617, 618

U.

Union Bank of London v.	
Ingram	616
Upton v. Bassett	103
v.	655
Urch v. Walker	
Urwinn, Law v.	490

Vanderplank v. King	326
Vane v. Vane	551
Vaughan, Viner v.	31
Vicary, Phcysey v.	381
Vickers v. Cowell	517
Vincent v. Bishop of Sodor and Man	346
Viner v. Vaughan	
Vint v. Padget	
Vivian, Jenkin v.	616
Vize, Wrixon v.	553
	270
Vyvyan v. Arthur	463

W.

Wadham, Roach v.	351
Wadkin, Barrow v.	198
Wainwright v. Elwell	442
Wakeford, Wright v.	346
Waldo v. Waldo	31, 33
Wale v. Commissioners of In- land Revenue	519
Walker, Allen v.	212
—— v. Richardson	97
Urch v.	
Wheelwright v.	49
Woodhouse v.	30
Wallahi, Wilson v.	474

	PAGE
Walsh v. Bishop of Lincoln ..	399
Walton, Ex parte	474
Ward, Berridge v.	379
—— Kenworthy v.	166
—— Lord, v. Lumley	180
Wardo, Bristow v.	325
Wardle v. Brucklehurst	381
Ware v. Cann	24
Warman v. Faithfull	459
Warren, Hutton v.	482
—— v. Rudall	30
Warrick v. Queen's College ..	376, 665, 605
Waterhouse, Hall v.	269
Watkins, Doe d. Lord Brad- ford v.	456
—— v. Nash	180
Watson, Kettlewell v.	524
—— Ravis v.	393
Watts v. Kelson	381, 579
• —— Smith v.	478
Wayman, Peppergorn v.	448
• Webb v. Austin ..,	461
—— v.	
Webber, Parmenter v.	477
Weber, Fitch v.	88
Webster, Moore v.	275
Weeding, Machell v.	257
Weeks v. Sparke	608
Welch, Haines v.	38
Welcome v. Upton	555
Weld, Graves v.	38, 455
Welden v. Bridgwater	615
Earl Cowley v.	30
v. Welleuley	33
Wells v. Gibbs	110
v. Kilpin	
Wescombe, Davies	33
West, Grose v.	379
West London and Crystal Palace Railway Company, Cole v.	17
West Mostyn Coal and Iron Company, Limited, Mostyn v.	532
Westbrook v. Blythe	474
Whalley, Ex parte	27
Wheate, Burgess v.	24, 198
Wheelwright v. Walker	49
Whelpdale, Hadleston v.	451
Whichelo, Doe d. Gregory v. ...	130,
Whieldon, Gordon v.	272
Whisson, Aveline v.	184
Whitbread v. Jordan	615
White, Baker v.	259
—— Dixon v.	18
—— Gould v.	427
—— v. Hillacre	527

	PAGE		PAGE
White v. Lisle	625	Wood, Rider v.....	160, 589
—— v. White	481	—— Tierney v.	201
Whitehead, Rhodes v.	320	Woodgate, Bingham v.	421
Whiteley, Plummer v.	40	Woodhouse v. Walker	30
Whitfield v. Bewit	30	Woodroffe, Doe d. Daniell v...	244
Whitstable, The Freefishers		Woolcombe, Thorn v.....	477
of, Gann v.	380	Woolfe v. Hill	33
Whittaker, Doe d. Leach v. ..	441	Wordsworth, Nicloson v...122,	259
Whitton v. Peacock	502	Wortham v. Pemberton	267
Wigglesworth v. Dallison	482	Worthington v. Gimson.....	381
Wight's Mortgage Trust, Re..	524	Worwood, Price v.	467
Wilcox v. Smith	335	Wright v. Barlow	346
Wilkinson v. Joberns	170	—— Bradbury v.	471
Willan, Chester v.	166	—— c. Burroughes.....	295
Willcock v. Terrell	120	—— Reynolds v.....	389
Williams v. Bosanquet	462	—— v. Sanderson	246
—— v. Games	170	—— v. Wakeford	346
—— c. Hayward	478	Wrightson v. Hudson	524
—— Jones v.	110	Wrixon v. Vize	553
—— Martyn v.	463	Wyatt, Hodgkinson v.	516
Willis v. Brown	233	Wybranta, Commissioners of	
Willock, Seaward v.	325*	Charitable Donations v.....	550
Willoughby v. Willoughby ..	493	Wylde, Re	272
Wills v. Catling	478	Wylie, Wishart v.	379
—— v. Foster	120	Wynne v. Griffith	351
Wilmot v. Pike	522		
Wilson, Arden v.....	435		
—— Beardman v.	477		
—— Doe d. Perry v.	430		
—— c. Eden	473		
—— Greaves v.	518		
—— Harding v.	381		
—— c. Page.....	626		
—— The Queen v.	449		
—— Rowbotham v.	18		
—— c. Wallani	474		
—— c. Wilson.....	372		
Wiltshire v. Rabbits	522		
Winder v. Lawes.....	447		
Windsor, Lord, Earl of Pom-			
fret v.....	455		
Winter v. Lord Anson	515		
Wishart v. Wylie	379		
Wodehouse v. Farebrother ..	212		
Wood v. Copper Miners' Com-			
pany	212		

Y.

Yarborough, Lord, Rex v. ..	380
Yates v. Aston.....	520
—— c. Boen	89
—— Bridge v.	165
Yellowly v. Gower	30
York, Archbishop of, Roe d.	
Earl of Berkeley v.....	480
Youle v. Jones.....	226

Z.

Zouch, Lord, v. Dalbiac	433
—— v. Parsons	89

TABLE OF ABBREVIATIONS.

Ad. & Ell.	Adolphus & Ellis's Queen's Bench Reports.
Amb.	Ambler's Reports in Chancery from 1737 to 1783.
App. Cas.	Appeal
Ass.	Liber Assisarum.
Atk.	Atkyn's Reports in Chancery from 1736 to 1754.
B. & A.	Barnewall & Alderson's Reports in the King's Bench from 1817 to 1822.
B. & Ad.	Barnewall & Adolphus's Reports in the King's Bench.
B. & C. or Barn. & Cress. ..	Barnewall & Cresswell's Reports in the
B. & P.	Bosanquet & Puller's Reports in the Common Pleas from 1797 to 1804.
B. R.	Bancum Regis, the King's Bench.
B. & S.	Best & Smith's Reports in the Queen's Bench.
Bac. Abr.	New Abridgment of the Law by Matthew Bacon, Gwillim & Dodd's Edition in 8 vols.
Bac. Tr.	The Law Tracts of Lord Bacon.
Beav.	Beavan's Reports in the Rolls Court.
Bing.	Bingham's Reports in the Common Pleas.
Bing. N. C.	Bingham's New Cases in the Common Pleas.
Black. Com.	Blackstone's Commentaries.
Bract.	Bracton de Legibus.
Britt.	Britton's Treatise.
Bro. Ab.	Brooke's Abridgment.
Bro. C. C.	Brown's Cases in Chancery from 1778 to 1794.
Brod. & Bing.	Broderip & Bingham's Reports in the Common Pleas from 1819 to 1822.
Burr.	Burrow's Reports in the King's Bench from 1756 to 1772.
C. B.	The Common Bench or Court of Common Pleas, also the Common Bench Reports.
C. B., N. S.	Common Bench Reports, New Series.
C. P.	Common Pleas.
C. P. Coop.	
W. R. P.	

C. P. D.	Common Pleas Division.
Ca. t. Talbot	Cases in Chancery in time of Lord Talbot.
Ch. Ap.	Chancery Appeals. *
Ch. D.	Chancery Division.
Cha. Ca.	Cases in Chancery, folio.
Cha. Rep.	Reports in Chancery, folio.
Cl. & Fin.	Clark & Finnelly's Reports in the House of Lords.
Co.	Coke's Reports, generally cited as Rep.—the Reports par excellence.
Co. Cop.	Coke's Complete Copyholder.
Co. Litt.	Coke upon Littleton.
Co. Tr.	Coke's Law Tracts.
Coll.	Collyer's Reports in Chancery.
Com.	Comyns's Reports.
Com. Dig.	Chief Baron Comyns's Digest of the Law.
Conn. & Laws.	Connor & Lawson's Reports in the Irish Court of Chancery.
Coop.	G. Cooper's Reports in Chancery.
Cowp.	Cowper's Reports in the King's Bench from 1774 to 1778.
Cro. Fl.	} Croke's Reports in time of Elizabeth, James I. and Charles I.
Cro. Jac.	
Cro. Car.	
Cro. & Jer.	Crompton & Jervis's Reports in the Court of Exchequer.
Cro. & M.	Crompton & Meeson's Reports in the Court of Exchequer.
Cro. M. & R.	Crompton, Meeson & Roscoe's Reports in the Court of Exchequer.
Cru. Fi.	} Cruise on Fines and Recoveries.
Cru. Rec.	
De Gex, F. & J.	De Gex, Fisher & Jones's Reports in Chancery.
De Gex, M. & G.	De Gex, Macnaghten & Gordon's Reports in Chancery.
De Gex & S.	De Gex & Smale's Reports in Chancery.
Dom. Proc.	Domus Procerum, the House of Lords.
Dougl.	Douglas's Reports.
Dow. & Ryl.	Dowling & Ryland's Reports in the King's Bench.
	Drewry's Reports in the Court of Vice-Chancellor Kindersley.
Drew. & Sma.	Drewry & Smale's Reports in the same Court.
	Drury & Warren's Reports in the Irish Court of Chancery.
	Drury's Reports in the Irish Court of Chancery.
	Dyer's Reports in the time of Henry VIII., Edward VI., Mary and Elizabeth.

E. & B.	Ellis & Blackburn's Queen's Bench
E. B. & E.	Ellis, Blackburn & Ellis's Queen's Reports
East	East's Reports in the King's Bench.
Eq. Ca. Ab.	Abridgment of Cases in Equity, folio.
Esp.	Espinasse's Nisi Prius Reports.
Ex.	Exchequer Reports.
Ex. D.	Exchequer Division.
F. N. B.	Fitzherbert's Natura Brevium.
Fearne, C. R.	Fearne on Contingent Remainders and Executory Devises. Butler's Edition.
Fitz. Abr.	Fitzherbert's Abridgment.
Fonbl. Eq.	Fonblanque's Edition of the Anonymous Treatise on Equity.
Giff.	Giffard's Reports in the Court of Vice-Chancellor Stuart.
Gilb. Ten.	Chief Baron Gilbert's Treatise on Tenures.
Gilb. Uses	Chief Baron Gilbert's Treatise on Uses.
H. Bl.	Henry Blackstone's Reports from 1788 to 1796.
H. & C.	Hurlstone & Coltman's Exchequer Reports.
H. of L.	The House of Lords.
H. & N.	Hurlstone & Norman's Exchequer Reports.
Hale, P. C.	Sir Matthew Hale's Treatise on Pleas of the
Hard.	Hardres's Reports in the Court of Exchequer, folio, from 1655 to 1669.
Harc	Harc's Reports in Chancery.
Hil.	Hilary Term.
Inst.	Coke's
J. B. Moore	J. B. Moore's Reports in the Court of Common Pleas.
Jac. & W.	Jacob & Walker's Reports in CI
Jacob	Jacob's ditto.
Johnson	Johnson's Reports, Vice-Chancellor Wood.
John. & Hem. ..	Johnson & Hemming's Reports, Vice-Chan-
Jones & Lat.	Jones & Latouche's Reports in the Irish Court of Chancery.
Jur.	Jurist Reports.
Jur., N. S.	Jurist Reports, New Series.
Kay	Kay's Reports in the Court of Vice-cellor Wood.
Kay & John.	Kay & Johnson's Reports in the Court of Vice-Chancellor Wood.
Keble	Keble's Reports, folio.
Keil.	Keilway's Re
L. J.	Law Journal
L. JJ.	Lords Justices.

TABLE OF ABBREVIATIONS.

L. R.	Law Reports of the Incorporated Council of Law Reporting.
L. R., Ch., or L. R., Ch. Ap..	Law Reports, Chancery Appeals.
L. R., Eq.	Law Reports in Equity.
L. T.	Law Times Reports.
Leon.	Leonard's Reports, folio, in time of Elizabeth and James.
Lev.	Levinz's Reports from 1660 to 1695.
Litt.	Littleton's Tenures.
Lord Raym.	Lord Raymond's Reports.
M. or Mich.	Michaelmas Term.
M. & Cr.	Mylne & Craig's Reports in Chancery.
M. R.	Master of the Rolls.
M. & S.	Maule & Selwyn's Reports in the King's Bench.
M. & W.	Meeson & Welsby's Reports in the Ex-
Mad. Form. Ang.	Madox's Formulæ Anglicanum.
Madd.	Maddock's Reports in the Vice-Chancellor's Court.
Man. & Gran.	Manning & Granger's Reports in the Court of Common Pleas.
Mer.	Merivale's Reports in Chancery from 1815 to 1817.
Mod.	Modern Reports in time of Charles II.
Moo.	Sir Fr. Moore's Reports, folio, in time of Elizabeth and James.
Moo. & Scott	Moore & Scott's Reports in the Common Pleas.
My. & K.	Mylne & Keen's Reports in Chancery.
Nev. & Man.	Neville & Manning's Reports in the Queen's Bench.
New Cas.	Bingham's New Cases in the Common Pleas.
New Rep.	Bosanquet & Fuller's New Reports in the Common Pleas.
O. Bridg.	Sir Orlando Bridgman's Judgments, edited by Bannister.
P. C.	Privy Council.
P. D.	Probate Division.
P. Wma. or P. W.	} Peere Williams' Reports in Chancery from 1695 to 1735.
Pasch.	
Per. & Dav.	Perry & Davison's Reports in the Queen's Bench.
.....	Phillips's Reports in Chancery.
Plowd.	Plowden's Commentaries or Reports, folio.
Pollexf.	Pollexfen's Reports, folio, from 1670 to 1684.
Popham	Popham's Reports, folio.

TABLE OF ABBREVIATIONS.

Pre. Cha.	Precedents in Chancery from 1687 to
Prest. Abstr.	Preston on Abstracts of Title.
Prest. Conv.	Preston on Conveyancing.
Price	Price's Reports in the Court of Exchequer.
Q. B.	Queen's Bench or Queen's Bench Reports.
Q. B. D.	Queen's Bench Division.
Rep.	The Reports of Lord Coke.
Ro. Ab.	Rolle's Abridgment.
Rob. Gav.	Robinson on Gavelkind. ●
Rop. Husb. & Wife	Roper's Treatise on the Law of Husband and Wife. Edited by Jacob.
Russ.	Russell's Reports in Chancery.
Russ. & My.	Russell and Mylne's Reports in Chancery.
S. C.	Same case.
S. & S. or Sim. & Stu.	Simons and Stuart's Reports in the Vice- Chancellor's Court.
Salk.	Salkeld's Reports, folio, from 1 W. & M. to 10 Anne.
Sand. Uses.	Sanders on Uses and
Sax. Chro.	The Saxon Chronicle.
Sch. & Lefr.	Schoales & Lefroy's Reports in Chancery in Ireland in time of Lord
Scriv. Cop.	Scriven on Copyholds.
Shep. Touch.	Sheppard's Touchstone of Common Assur- ances.
Sim.	Simon's Reports in the Vice-Chancellor's Court.
Sir T. Raym.	Sir Thomas Raymond's Reports.
Sm. & Giff.	Smale & Giffard's Reports in the Court of Vice-Chancellor Stuart.
Stark.	Starkie's Nisi Prius Reports.
Stat.	Statute.
Str.	Strange's Reports from 1716 to 1747.
Sugd. Pow.	Sugden (afterwards Lord St. Leonards) on Powers.
Sugd. V. & P.	Sugden (afterwards Lord St. Leonards) on Vendors and Purchasers.
Swanst.	Swanston's Reports in Chancery in 1818 and
T. Rep.	Term Reports in the King's Bench by Durn- ford and East, from 1786 to 1800.
Tau.	Taunton's Reports in the Common Pleas from 1807 to 1819.
Trin.	Trinity Term.
Turn.	Turner's Reports in Chancery in 1822 and 1823.
Turn. & Russ.	Turner and Russell's Reports in Chancery.
Tyr.	Tyrlwhitt's Reports in the Court of Ex-

V. & B.	Vesey & Beames's Reports in Chancery in 1813 and 1814.
V.-C.	Vice-Chancellor.
V.-C. B.	Vice-Chancellor Bacon.
V.-O. E.	Vice-Chancellor of England, an office now abolished.
V.-C. G.	Vice-Chancellor Giffard.
V.-C. H.	Vice-Chancellor Hall.
V.-C. J.	Vice-Chancellor James.
V.-C. M.	Vice-Chancellor Malins.
V.-C. S.	Vice-Chancellor Stuart.
V.-C. W.	Vice-Chancellor Wood or Vice-Chancellor Wickens.
Ventr.	Ventris's Reports in time of Charles II.
Vern.	Vernon's Reports in Chancery from 1680 to 1716.
Ves. or Ves. Sen.	Vesey's Reports in Chancery from 1747 to 1755.
Ves. Jun.	Vesey Junior's Reports in Chancery from 1789 to 1816.
Vin. Abr.	Viner's Abridgment.
W. Black.	Sir William Blackstone's Reports from 1746 to 1780.
W. Rep.	The Weekly Reporter.
Watk. Cop.	Watkins on Copyholds.
Watk. Des.	Watkins on Descent.
Wightw.	Wightwick's Reports in the Court of Ex-
Willes	Willes's Reports.
Wila.	Wilson's Reports in King's Bench and Common Pleas from 1742 to 1769.
Wms. Saund.	Saunders's Reports in time of Charles II. Edited by Serjeant Williams and Sir E. V. Williams.
You. & Coll.	Younge & Collyer's Reports in the Equity Exchequer.
You. & Coll. New Cas.	Younge & Collyer's Reports in Chancery.

ERRATUM.

Page 213, note (e) For "40 Vict. c. 6," read "40 Vict. c. 9."

PRINCIPLES

OF THE

LAW OF REAL PROPERTY.

INTRODUCTORY CHAPTER.

OF THE CLASSES OF PROPERTY.

IN the early ages of Europe, property was chiefly of a Property at first a substantial and visible, or what lawyers call, a corporeal cc kind. Trade was little practised (*a*), and consequently debts were seldom incurred. There were no public funds, and of course no funded property. The public wealth consisted principally of land (*b*), and the houses and buildings erected upon it, of the cattle in the fields, and the goods in the houses. Now land, which is immoveable and indestructible, is evidently a different destructible. species of property from a cow or a sheep, which may be stolen, killed, and eaten; or from a chair or a table, which may be broken up or burnt. No man, be he ever so feloniously disposed, can run away with an acre of land. The owner may be ejected, but the land remains where it was; and he, who has been wrongfully turned out of possession, may be reinstated into the identical portion of land from which he had been removed. Not so with moveable property; the thief Movables destructible.

(*a*) 3 Hallam's Middle Ages, • (*b*) 1 Hallam's Middle Ages, 367—369.

may be discovered and punished; but if he has made away with the goods, no power on earth can restore them to their owner. All he can hope to obtain is a compensation in money, or in some other article of equal value.

and *Movable* and *immovable* (*c*) is then one of the simplest and most natural divisions of property in times of but partial civilization. In our law this division has been brought into great prominence by the circumstances of our early history.

The Norman
st.

By the Norman conquest, it is well known a vast number of Norman soldiers settled in this country. The new settlers were encouraged by their king and master; and whilst the conquered Saxons found no favour at court, they suffered a more substantial grievance in the confiscation of the lands of such of them as had opposed the Conqueror (*d*). The lands thus confiscated were granted out by the Conqueror to his followers, nor was their rapacity satisfied till the greater part of the lands in the kingdom had been thus disposed of (*e*). In these grants the Norman king and his vassals followed the custom of their own country, or what is called the feudal system (*f*). The lands granted were not given freely and for nothing; but they were given to hold of the king, subject to the performance of certain military duties as the condition of their en-

(*c*) Quandoque res *mobiles*, ut cattalla, ponuntur in vadium, quandoque res *immobiles*, ut terre, et tenementa, et redditus. Glanville, lib. x. c. 6. See also lib. vii. c. 16, 17.

(*d*) Wright's Tenures, 61, 62; 2 Black. Com. 48.

2 Hallam's Middle Ages,

424. As to the confiscation of land after the Norman Conquest, see Freeman's Norman Conquest, ch. xvii. § 2 (vol. iv. pp. 22—27, 32—56), and ch. xxii. (vol. v. pp. 7, 17, 20 *et seq.*): Stubbs' Constitutional History, § 95 (vol. i. p. 257, 2nd ed.).

(*f*) Wright's Tenures, 63.

joyment (*g*). The king was still considered as in some sense the proprietor, and was called the lord paramount (*h*); while the services to be rendered were regarded as incident or annexed to the ownership of the land; in fact, as the rent to be paid for it.

This feudal system of tenures, or holding of the king, was soon afterwards applied to all other lands, although they had not been thus granted out, but remained in the hands of their original Saxon owners. How this change was effected is perhaps a matter of doubt. Sir Martin Wright (*i*), who is followed by Blackstone (*k*), supposes that the introduction of tenures, as to lands of the Saxons, was accomplished at a stroke by a law (*l*) of William the Conqueror, by which he required all free men to swear that they would be faithful to him as their lord. "The terms of this law," says Sir Martin Wright, "are absolutely feudal, and are apt and proper to establish that policy with all its consequences." Mr. Hallam, however, takes a different view of the subject; for while he considers it certain that the tenures of the feudal system were thoroughly established in England under the Conqueror (*m*), he yet remarks that by the transaction in question an oath of fidelity was required from the tenants of the great landowners, as well as from the

Introduction
of the fe
system.

(*g*) 1 Hallam's Middle Ages, 178, 179, note.

(*h*) Coke upon Littleton, 65 a.*

(*i*) Wright's Tenures, 64, 65.

(*k*) 2 Black. Com. 49, 50.

(*l*) The 52nd in Wilkins's *Leges Anglo-Saxonice*; it appears as *Laws of William the Conqueror* III. 2, in the Record Commissioners' edition of the *Ancient Laws and Institutes of England*, and in Schmid, *Die Gesetze der Angel Sachsen*. Statuimus ut

omnes liberi homines fassero et sacramento affirmant, quod intra et extra universum regnum Angliæ Wilhelmo regi domino suo fideles esse volunt; terras et honores illius omni fidelitate ubique servare cum eo, et contra inimicos et alienigenas defendere. Cf. the version given in Stubbs' *Select Charters*, p. 83, 2nd ed.

* (*m*) 2 Hallam's Middle Ages, 429.

INTRODUCTORY CHAPTER.

great landowners themselves, "thus breaking in upon the feudal compact in its most essential attribute, the exclusive dependence of a vassal upon his lord" (n). The truth appears to be that Norman customs, and their upholders and interpreters, Norman lawyers, were the real introducers of the feudal system of tenures into the law of this country. Before the conquest, landowners were subject to military duties (o); and to a soldier it would matter little whether he fought by reason of tenure, or for any other reason. The distinction between his services being annexed to his *land*, and their being annexed to the *tenure* of his land, would not strike him as very important. These matters would be left to those whose business it was to attend to them; and the lawyers from Normandy, without being particularly crafty, would, in their fondness for their own profession, naturally adhere to the precedents they were used to, and observe the customs and laws of their own country. Perhaps even they, in the time of the Conqueror, troubled themselves but little about the laws of landed property. The statutes of William are principally criminal, as are the laws of all half-civilized nations. Life and limb are of more importance than property; and when the former are in danger, the

(n) 2 Hallam's Middle Ages, 430. Mr. Hallam refers to the Saxon Chronicle, which gives the following account:—*Postea sic itinera disposuit ut pervenerit in festo Primitiarum ad Searebyrig (Sarum), ubi ei obviam venerunt ejus procere; et omnes prædia tenentes, quotquot essent notæ melioris per totam Angliam, hujus viri servi fuerunt, omnesque se illi subdidere, ejusque facti sunt vassali, ac ei fidelitatis juramenta præstiterunt se contra alios quos illi fides futuros.—Sax.*

Chron. anno 1086. As to this assembly at Salisbury, see Freeman, Norman Conquest, vol. iv. pp. 694, 695; vol. v. p. 366; Stubbs, Constitutional History, § 96 (vol. i. pp. 265—267, 2nd ed.).

(o) Sharon Turner's Anglo-Saxons, vol. ii. app. iv. c. 3, 560; 2 Hallam's Mid. Ages, 410; Freeman, Norm. Conq., vol. i. p. 92, 2nd ed.; Stubbs, Const. Hist., §§ 36, 75 (vol. i. pp. 76, 189, 2nd ed.).

security of the latter is not much regarded. When the convulsions of the conquest began to subside, the Saxons felt the effects of the Norman laws, and cried out for the restoration of their own; but they were the weaker party and could not help themselves. By this time the industry of the lawyers had woven a net from which there is no escaping (*p*). But in what precise manner tenures crept in, was a question perhaps never asked in those days; and if asked, it could not probably, even then, have been minutely answered (*q*).

(*p*) 2 Hallam's Middle Ages, 468.

(*q*) It is now generally accepted that the introduction of the feudal element into the English land laws was accomplished by a gradual process. The main features of what is called the feudal system of tenures were 1. the principle that all land is held, either mediately or immediately of the king; 2. the union of the relation of lord and man with that of landlord and tenant, whereby the personal service due from the vassal to his superior became the condition of his holding land granted to him by his lord; and 3. the jurisdiction of the lord over his tenants. The personal relation of lord and man was known to English law before the Norman Conquest. And it appears that English institutions were in other respects tending towards feudalism at the time of the conquest. The introduction into English law of the feudal principle that all land is held, either mediately or immediately, of the Crown, seems to have been the immediate result of the conquest, and of the grants or re-grants of land made by William to his followers or to the former owners. But it does not appear that William directly instituted military tenures, and the law of tenure by knight's service seems to have been developed during the reigns succeeding that of the Conqueror. By the time of Henry II. military tenures and their incidents are found to be fully established as part of English law; see the treatise attributed to Glanville lib. 7, c. 2, 17, and lib. 9, which was written in that reign. For an account of what is known of the earliest English land laws and of the effect thereon of the Norman Conquest, the reader is referred to Freeman's Norman Conquest, ch. iii. § 2 vol. i. p. 79, 2nd ed.; ch. xxiv. § 2 (vol. v. p. 364), and notes HH and II (vol. v. pp. 864-865); Stubbs, Constitutional History, §§ 24, 33-39, 74, 75, 93-96 (vol. i. pp. 48, 67-85, 187-194, 250-267, 2nd ed.). There seems to be no doubt that many rights which form part of our present land laws owe their origin to the occupation of land by village and tribal communities in times long before the Norman Conquest, and to the customs observed by such communities in cultivating arable land upon the common or open field

Introduction
of feudal
tenures.

Village com-

The system of tenure could evidently only exist as to lands and things immoveable (*r*). Cattle and other moveables were things of too perishable and insignificant a nature to be subject to any feudal liabilities, and could therefore only be bestowed as absolute gifts. No duty or service could well be annexed as the condition of their ownership. Hence a superiority became attached to all *immoveable* property, and the distinction between it and *moveables* became clearly marked; so that, whilst *lands* were the subject of the disquisitions of lawyers (*s*), the decisions of the Courts of justice (*t*), and the attention of the legislature (*u*), *moveable* property passed almost unnoticed (*x*).

Lands, tenements and hereditaments.

Lands, houses, and immoveable property,—things capable of being held in the way above described,—were called *tenements* or *things held* (*y*). They were also denominated *hereditaments*, because, on the death of the owner, they devolved by law to his heir (*z*). So that the phrase *lands, tenements and hereditaments*, was used by the lawyers of those times to express all sorts of property of the first or immoveable class; and the expression is in use to the present day.

system of husbandry, and in depasturing their cattle upon waste or meadow land; see the late author's treatise upon Rights of Common, pp. 37--102; Nasse on the Agricultural Community of the Middle Ages, translated into English by Col. Ouvry, and published by the Cobden Club, 1872; and the evidence as to the common field system of cultivation collected by Mr. Seebohm in his recent work on the English Village Community.—EDITOR'S NOTE.

(*r*) Co. Litt. 191 a. n. (1) II. 2.

(*s*) See Treatises of Glanville, Bracton, Britton, and Fleta; the Old Tenures, and the Old Natura

(*t*) See the Year-Books.

(*u*) See the Statutes.

(*x*) 2 Black. Com. 384.

(*y*) Constitutions of Clarendon, Art. 9; Glanville, lib. ix. cap. 1, 2, 3, *passim*; Bracton, lib. 2, fol. 26 a; stats. 20 Hen. III. c. 4; 13 Edw. I. c. 1; Co. Litt. 1 b; Shep. Touch. 91.

• (*z*) Co. Litt. 6 a; Shep. Touch. 91.

OF THE CLASSES OF PROPERTY.

The other, or moveable class of property, was known by the name of *goods* or *chattels*. The derivation of the word *chattel* has not been precisely ascertained (a). Both it and the word *goods* are well known to be still in use as technical terms amongst lawyers. Goods and chattels.

So great was the influence of the feudal system, and so important was the tenure or holding of lands, whether by the vassals of the crown, or by the vassals of those vassals, that for a long time immoveable property was known rather by the name of *tenements* than by any other term more indicative of its fixed and indestructible nature (b). In time, however, from various causes, the feudal system began to give way. The growth of a commercial spirit, the rising power of towns, and the formation of an influential middle class, combined to render the relation of lord and vassal anything but a reciprocal advantage; and at the restoration of King Charles II. a final blow was given to the whole system (c). Its form indeed remained, but its spirit was extinguished. The tenures of land then became less burdensome to the owner, and less troublesome to the law student; and the Courts of law, instead of being occupied with disputes between lords and tenants, had their attention more directed to controversies between different owners. It became then more obvious that the essential difference between lands and goods was to be found in the remedies for the deprivation of either; that land could always be restored, but goods could not; that, as to the one, the *real* land itself could be recovered; but, as to the other, proceedings must be had against the *person* who had taken Tenements.

(a) See, however, 2 Black. Com. 385; Skeat's Etymological Dictionary, sub verb. *chattel* and

(b) It is the only word used in the important statute De Donis, 13 Edw. I. c. 1; see Co. Litt. 19 b.

(c) By statute 12 Car. II. c. 24.

and
1

them away. The two great classes of property accordingly began to acquire two other names more characteristic of their difference. The remedies for the recovery of lands had long been called *real* actions, and the remedies for loss of goods *personal* actions (*d*). But it was not until the feudal system had lost its hold, that lands and tenements were called *real property*, and goods and chattels *personal property* (*e*).

It appears then, that lands and tenements were designated, in later times, *real property*, more from the nature of the legal remedy for their recovery than simply because they are real things; and on the other hand, goods and chattels were called *personal property* because the remedy for their abstraction was against the person who had taken them away. Personal property has been described as that which may attend the owner's person wherever he thinks proper to go (*f*), but goods and chattels were not usually called things personal till they had become too numerous and important to attend the persons of their owners.

The terms *real property* and *personal property* are now more commonly used than the old terms *tenements*

(*d*) Glauville, lib. x. c. 13; Bracton, lib. iii. fol. 101 b, par. 1; 102 b, par. 4; Britton, 1 b; Fleta, lib. i. c. 1; Litt. sects. 444, 492; Co. Litt. 284 b, 285 a; 3 Black. Com. 117.

(*e*) The terms *lands and tenements, goods and chattels*, are constantly used in Coke upon Littleton and Sheppard's Touchstone, both of them works compiled in the early part of the 17th century. The nearest approximation the writer can find in either of the above books to the now common division into *real* and *personal* is,

the expression "things, whether real, personal or mixed," in Co. Litt. 1 b and 6 a, and in Touchstone, p. 91, an expression which has an obvious reference to the division of actions into the same three classes. In the early part of the last century, the terms *real* and *personal*, as applied to property, were in common use. See 1 P. Wms. 553, 575, anno 1719; *Ridout v. Pain*, 3 Atkyns, 486, anno 1747.

(*f*) 2 Black. Com. 16, 834; 3 Black. Com. 144.

and hereditaments, goods and chattels. The old terms were, indeed, suited only to the feudal times in which they originated; since those times great changes have taken place, commerce has been widely extended, loans of money at interest have become common (*g*), and the funds have engulfed an immense mass of wealth. Both classes of property have accordingly been increased by fresh additions; and within the new names of *real* and *personal* many kinds of property are now included, to which our forefathers were quite strangers: so much so that the simple division into immoveable tenements and moveable chattels, is lost in the many exceptions to which time and altered circumstances have given rise. Thus, shares in canals and railways, which are sufficiently immoveable, are generally personal property (*h*); funded property is personal; whilst a dignity or title of honour, which one would think to be as locomotive as its owner, is not a chattel but a tenement (*i*). Canal and railway shares and funded property are made personal by the different Acts of Parliament under the authority of which they have originated. And titles of honour are real property, because in ancient times such titles were annexed to the ownership of various lands (*k*).

But the most remarkable exception to the original rule occurs in the case of a lease of lands or houses for a term of years. The interest which the lessee, or person who has taken the lease, possesses, is not his real (*l*), but

(*g*) Such loans were formerly considered unchristian. Glanville, lib. 7, c. 16; lib. 10, c. 3; 1 Reeves's History, 119, 262.

(*h*) New River shares are an exception, *Irybutter v. Bartholomew*, 2 P. Wms. 127; see also *Buckeridge v. Ingram*, 2 Ves. jun. 652; *Bligh v. Brent*, 2 You. &

Coll. 268.

(*i*) Co. Litt. 20 a, n. (3), *Earl Ferrers' case*, 2 Eden, Appendix, p. 373.

(*k*) 1 Hallam's Middle Ages, 158.

(*l*) Bracton, lib. 2, fol. 27 a, par. 1.

his personal property; it is but a chattel (*m*), though the rent may be only nominal, and the term ninety or even a thousand years. This seeming anomaly is thus explained. In the early times, to which we have before referred, towns and cities were not of any very great and general importance; their influence was local and partial, and their laws and customs were frequently peculiar to themselves (*n*). Agriculture was then, though sufficiently neglected, yet still of far more importance than commerce; and from the necessities of agriculture arose many of our ancient rules of law. That the most ancient leases must have been principally farming leases, is evident from the specimens of which copies still remain (*o*), and also from the circumstance that the word *farm* applies as well to anything let on lease, or *let to farm*, as to a farm house and the lands belonging to it. Thus, we hear of farmers of tolls and taxes, as well as of farmers engaged in agriculture. Farming in those days required but little capital (*p*), and farmers were regarded more as bailiffs or servants, accountable for the profits of the land at an annual sum, than as having any property of their own (*q*). If the farmer was ejected from his land by any other person than his landlord, he could not, by any legal process, again obtain possession of it. His only remedy was an action for damages against his landlord (*r*), who was bound to warrant him quiet possession (*s*). The farmer could therefore be

(*m*) Co. Litt. 46 a; correct Lord Coke's reference at note (*m*), from ass. 82 to ass. 28.

(*n*) See as a specimen, Bac. Abr. tit. Customs of London.

(*o*) See Madox's *Formulare Anglicanum*, tit. Demise for Years, in which the great majority of leases given are farming

See as to the bad state of

agriculture, 3 Hallam's *Middle Ages*, 365; 2 Hume's *Hist. Eng.* 349.

(*q*) Gilb. *Tenures*, 39, 40; Watkins on *Descents*, 108 (113, 4th ed.); 2 Black. Com. 141.

(*r*) 3 Black. Com. 157, 158, 200.

(*s*) Bac. Abr. tit. Leases and Terms for Years, and Covenant, (B).

scarcely said to be the owner of the land, even for the term of the lease; for his interest wanted the essential incident of real property, the capability of being restored to its owner. Such an interest in land had, moreover, nothing military or feudal in its nature, and was, consequently, exempt from the feudal rule of descent to the eldest son as heir-at-law. Being thus neither real property, nor feudal tenement, it could be no more than a chattel; and when leases became longer, more valuable, and more frequent, no change was made; but to this day the owner of an estate for a term of years possesses in law merely a chattel. His leasehold estate is only his personal property, however long may be the term of years, or however great the value of the premises comprised in his lease (*t*).

There is now perhaps as much personal property in the country as real; possibly there may be more. Real property, however, still retains many of its ancient laws, which invest it with an interest and importance to which personal property has no claim. Of these ancient laws, one of the most conspicuous is the feudal rule of descent, under which, as partially modified by amending acts (*u*), real property goes, when its owner dies intestate, to the *heir*, while personal property is distributed, under the same circumstances, amongst the *next of kin* of the intestate by an administrator appointed for that purpose, formerly by the Court of Probate (*x*), and now by the Probate Division of the High Court of Justice.

(*t*) *Quære*, however, whether Lord Coke would have agreed that a lease for years is personal property or personal estate, though it is now clearly considered as such; and see *Swift v. Swift*, 1 De Gex, F. & J. 160, 173; *Belaney*

v. Belaney, L. R., 2 Ch. Ap. 138.

(*u*) 3 & 4 Will. IV. c. 106, amended by stat. 22 & 23 Vict. c. 35, ss. 19, 20.

(*x*) Established by stat. 20 & 21 Vict. c. 77, amended by stat. 21 & 22 Vict. c. 95.

Corporeal and
il.

Besides the division of property into real and personal, there is another classification which deserves to be mentioned, namely, that of *corporeal* and *incorporeal*. It is evident that all property is either of one of these classes or of the other; it is either visible and tangible, or it is not (*y*). Thus a house is corporeal, but the annual rent payable for its occupation is incorporeal. So an annuity is incorporeal; "for, though the money, which is the fruit or product of this annuity, is doubtless of a corporeal nature, yet the annuity itself, which produces that money, is a thing invisible, has only a mental existence, and cannot be delivered over from hand to hand" (*z*). Corporeal property, on the other hand, is capable of manual transfer; or, as to such as is

(*y*) Bract. lib. 1, c. 12, par. 3, lib. 2, c. 5, par. 7; Fleta, lib. 3, c. 1, sec. 4.

(*z*) 2 Black. Com. 20. [The division, made by the English law, of hereditaments into corporeal and incorporeal is open to objection. It opposes the *subject-matter of rights* of one kind to *rights* of another kind. For example, land is said to be a corporeal hereditament, because it is a visible and tangible external object which descends to the heir upon the death of its owner intestate: an annuity, which descends to the heir on the death of the person last entitled to the same intestate, is said to be an incorporeal hereditament, because it is not a visible and tangible external object but a mere right, which is a conception of the mind. But on the death intestate of a tenant in fee simple (see *post*, Part I., Chap. III. of land a right descends to the heir just as much as in the case of an annuity. What the heir acquires is his ancestor's *estate*; that is, a *right* similar to that which his ancestor enjoyed, in virtue of which he is entitled to enter upon and hold the land, the subject-matter of that right. The student must remember that the division of hereditaments into corporeal and incorporeal is well established in English law, however unsatisfactory such a classification may appear in analytical jurisprudence. As forming part of English law, this classification must be accepted, and should be considered historically. See, further, as to the division of hereditaments into corporeal and incorporeal, Austin on Jurisprudence, pp. 372, 708, 804, 4th ed.; Poste's Gaius, pp. 132, 133 (Commentary on Gai. II., §§ 12--14). As to the classification of personal property, as corporeal or incorporeal, see the editor's note to Williams on Personal Property, p. 324, n. (a), 12th ed.—EDITOR'S NOTE]

immoveable, possession may actually be given up. Frequently the possession of corporeal property necessarily involves the enjoyment of certain incorporeal rights; thus the lord of a manor, which is corporeal property, may have the advowson or perpetual right of presentation to the parish church; and this advowson, which, being a mere right to present, is an incorporeal kind of property, may be appendant or attached, as it were, to the manor, and constantly belong to every owner. But, in many cases, property of an incorporeal nature exists apart from the ownership of anything corporeal, forming a distinct subject of possession; and, as such, it may frequently be required to be transferred from one person to another. An instance of this separate kind of incorporeal property occurs in the case of an advowson or right of presentation to a church, when not appendant to any manor. In the transfer or conveyance of incorporeal property, when thus alone and self-existent, formerly lay the practical distinction between it and corporeal property. For, in ancient times, the impossibility of actually delivering up any thing of a separate incorporeal nature, rendered some other means of conveyance necessary. The most obvious was writing; which was accordingly always employed for the purpose, and was considered indispensable to the separate transfer of every thing incorporeal (*a*); whilst the transfer of corporeal property, together with such incorporeal rights as its possession involved, was long permitted to take place without any written document (*b*). *Incorporeal* property, in our present highly artificial state of society, occupies an important position; and such kinds of incorporeal property as are of a real nature will hereafter be spoken of more at large. But for the present, let us give our undivided attention to property of a *corporeal* kind; and, as to this, the

The distinction was in the mode of transfer

(*a*) Co. Litt. 9 a.

(*b*) Co. Litt. 48 b, 121 b, 143 a, 271 b, n. (1).

scope of our work embraces one branch only, namely, that which is *real*, and which, as we have seen, being descendible to *heirs*, is known in law by the name of *hereditaments*. Estates or interests in corporeal hereditaments, or what is commonly called landed property, will accordingly form our next subject for consideration (c).

(Classification of property, as real or personal.

Different meanings of the word

(c) It may be worth while to consider the division of what is called property into real property and personal property in relation with the classification of rights made in analytical jurisprudence, as rights availing against all the world and rights availing only against particular persons (1). And first, we may observe that the word *property* is mainly used by lawyers in three different senses:—(1) As denoting the right of ownership, strictly so called. For instance, if a man lend his goods to a friend, it is said that the *property* in the goods remains in the lender (2). (2) As denoting the subject of a right of ownership. Thus, it may be said that certain goods are the *property* of a certain man; or, speaking of land, that the *property* of A. adjoins the *property* of B.; or that moveable and immoveable is one of the simplest divisions of *property* (3). (3) As denoting all rights, or an aggregate of rights, which either are rights of ownership or annexed to the ownership of land or goods, or are valuable as being likely to result in the ownership of land or goods, or in the improvement or more beneficial enjoyment of some land or goods owned; all rights, in fact, which can be assessed at a money value, that is, which are capable of being exchanged for the ownership of money. It is in this last sense that the word *property* seems to be used when a man speaks of all his property, or of the law of property, or of real property as opposed to personal property. It appears, then, that the English law classifies certain *rights* as real or personal property. It has been explained that this classification has arisen partly from the physical difference between land and goods, partly from the circumstances of English history, and partly from the nature of the remedies given by English law for the recovery of land and goods (4). Real and personal property seem to have taken their names from real and personal actions (5). Now the terms *real* and *personal* as applied to actions were borrowed from Roman law. And in Roman law a real action (*actio in rem*) was an action for the specific enforcement of a right availing against all the

(1) See Austin on Jurisprudence, pp. 45 *et seq.*, 380 *et seq.*, 964 *et seq.*, 4th ed.

(2) See *ante*, p. 2.

(4) *Ante*, pp. 1—8.

(5) See *ante*, p. 8; Williams

(3) See Williams on Personal Property, 2, 3. Property, 33, 12th ed.

world; whilst a personal action (*actio in personam*) was an action for the enforcement of a right arising from a breach of contract or from a wrong, and availing only against some particular person⁽⁶⁾. But in English law, the term *real actions* was only applied to actions for the specific enforcement of a right availing against all the world over some land⁽⁷⁾. For, although the ownership and possession of goods are rights availing against all the world, the remedies for the recovery of the possession of goods were in English law numbered amongst personal actions⁽⁸⁾. In process of time, the rights protected by real and personal actions respectively acquired the names of real and personal property or estate⁽⁹⁾. Thus it is that, although the force of the word *real*, as applied to property, is to denote that the rights so designated are rights which avail against all the world and can be specifically enforced, in English law the term *real property* is confined to rights over land. *Real property*, then, means rights over land, which avail against all the world and can be specifically enforced. So far as real property consists of legal as opposed to equitable⁽¹⁰⁾ rights, the meaning of the term gives an accurate definition of the rights designated. Thus, legal estates in land are rights availing against all the world, and an action to recover possession of land is of the nature of an action *in rem*. Incorporeal hereditaments are principally rights exercisable over the land of another, *jura in alieno solo*; for instance, a right to depasture cattle upon the land of another, or a right of way over the land of another⁽¹¹⁾. Such rights are rights availing against all the world⁽¹²⁾, and there are appropriate remedies for their protection, by means of which they may be specifically enforced⁽¹³⁾. Leasehold interests in land have fallen into the class of personal property, because, as we have seen⁽¹⁴⁾, a lease for a term of years was originally merely a right against a particular person, namely, the lessor, and the remedy for the violation of such a right could only be a personal action. When, however, it was established that possession of land leased for a term of years could be

(6) Gai. Comm. IV. §§ 1--9, 41, 45, 47; Inst. IV. vi. 1-15, Dig. XLIV. vii. 25.

(7) Bracton, lib. iii. cap. iii. par. iii. fol. 102.

(8) See Bracton, lib. iii. cap. iii. par. iv. fol. 102; Litt. ss. 497, 498.

(9) See *ante*, p. 8.

(10) As to the difference between legal and equitable rights, on Personal Property, p. 570, n. (c), 12th ed.; ●

Williams's Conveyancing Statutes, pp. 386-388, and see *post*, Part I. Ch. VIII.

(11) See *post*, Part II. Ch. IV.; Williams on Commons, 18, 301.

(12) Austin on Jurisprudence, 383, 966, 4th ed.

(13) See 3 Black. Comm. (Bk. iii. ch. xvi.) 236 *et seq.*; Williams on Commons, 1, 3, 18, 20, 26-30, 135, 160-165, 211, 228, 239, 264, 271, 287, 301,

(14) *Ante*, p. 10.

recovered by the lessee in an action of ejectment ⁽¹⁵⁾, a marked change took place in the nature of a leasehold interest in land. For it became a right availing against all the world which could be specifically enforced. Leasehold interests in land, or chattels real ⁽¹⁶⁾, are therefore now more properly grouped together with real property.—
EDITOR'S NOTE.

⁽¹⁵⁾ See Bracton, lib. iv. cap. xxxvi. fol. 220 ; 3 Black. Comm. 200, 201 ; *See* d. *Pool* v. *Errington*, 1 A. & E. 750, 755—757, and notes.

⁽¹⁶⁾ See Williams on Personal Property, 1, 2.

PART I.

OF CORPOREAL HEREDITAMENTS.

BEFORE proceeding to consider the estates which may be held in corporeal hereditaments or landed property, it is desirable that the legal terms made use of to designate such property should be understood; for the nomenclature of the law differs in some respects from that which is ordinarily employed. Thus a house is by lawyers generally called a *messuage*; and the term *messuage* was formerly considered as of more extensive import than the word *house* (a). But such a distinction is not now to be relied on (b). Both the term *messuage* and *house* will comprise adjoining outbuildings, the orchard, and curtilage, or court yard, and, according to the better opinion, these terms will include the garden also (c). The word *tenement* is often used in law, as in ordinary language, to signify a house: it is indeed the regular synonyme which follows the term *messuage*; a house being usually described in deeds as “all that messuage or tenement.” But the more comprehensive meaning of the word *tenement*, to which we have before adverted (d), is still attached to it in legal interpretation, whenever the sense requires (e). Again,

Terms of the law.

A messuage.

Tenement.

(a) *Thomas v. Lane*, 3 Cha. Ca. 26; Keilw. 57.

(b) *Doe d. Clements v. Collins*, 2 T. Rep. 489, 502; 1 Jarman on Wills, 779, 4th ed.

(c) Shep. Touch. 94; Co. Litt. 6 b, n. (1); *Smithson v. Cage*, Cro. Jac. 526; *Lord Grosvenor*

W.R.P.

v. Hampstead Junction Railway Company, 1 De Gex & Jones, 446.

Cole v. West London and Crystal 27

242, see Williams's Conveyance Statutes, 62.

(e) 2 Black. Comm. 16, 17, 59.

Land.

the word *land* comprehends in law any ground, soil, or earth whatsoever (*f*) ; but its strict and primary import is arable land (*g*). It will, however, include castles, houses, and outbuildings of all kinds ; for the ownership of land carries with it everything both above and below the surface, the maxim being *cujus est solum, ejus est usque ad cælum*. A pond of water is accordingly described as *land* covered with water (*h*) ; and a grant of land includes all mines and minerals under the surface (*i*). This extensive signification of the word *land* may, however, be controlled by the context ; as where land is spoken of in plain contradistinction to houses, it will not be held to comprise them (*k*). So mines lying under a piece of land may be excepted out of a conveyance of such land, and they will then remain the corporeal property of the grantor, with such incidental powers as are necessary to work them (*l*), and subject to the incidental duty of leaving a sufficient support to the surface to keep it securely at its ancient and natural level (*m*). In the same manner, chambers may be the subjects of conveyance as corporeal property, independently of the floors above or below them (*n*). The word *premises* is frequently used in law in its proper etymological sense of that which has been before mentioned (*o*). Thus, after

Chambers.

(*f*) Co. Litt. 4 a ; Shep. Touch. 92 ; 2 Black. Comm. 17 ; *Cooke*, dem., *Yates*, vouchee, 4 Bing. 90.

(*g*) Shep. Touch. 92.

(*h*) Co. Litt. 4 b.

(*i*) 2 Black. Comm. 18.

(*k*) 1 Jarman on Wills, 777, 4th ed.

(*l*) *Earl of Cardigan v. Armistage*, 2 Barn. & Cress. 197. 211.

(*m*) *Humphries v. Brogden*, 12 Q. B. 739 ; *Smart v. Morton*, 5 E. & B. 30 ; *Rogers v. Taylor*, 2 H. & N. 828 ; *Reichotham v. Wilson*, 8 E. & B. 123, affirmed 8 H. of L.

Cas. 348 ; *Bonomi v. Backhouse*, E. B. & E. 622, affirmed 9 H. of L. Cas. 503 ; *Dugdale v. Robertson*, 3 Kay & J. 695 ; *Stroyan v. Knowles*, 6 H. & N. 454 ; *Smith v. Darby*, L. R., 7 Q. B. 716 ; *Davis v. Trecharne*, 6 App. Cas. 460 ; *Dixon v. White*, 8 App. Cas. 833 ; *Love v. Bell*, 9 App. Cas. 286.

(*n*) Co. Litt. 48 b ; Shep. Touch. 206. See 12 Q. B. 757.

(*o*) *Doe d. Biddulph v. Meakin*, 1 East, 456 ; 1 Jarman on Wills, 778, 4th ed.

a recital of various facts in a deed, it frequently proceeds "in consideration of the *premises*," meaning in consideration of the facts before mentioned; and property is seldom spoken of as *premises*, unless a description of it is contained in some prior part of the deed. Most of the words used in the description of property have however no special technical meaning, but are construed according to their usual sense (*p*); and, as to such words as have a technical import more comprehensive than their ordinary meaning, it is very seldom that such extensive import is alone relied on: but the meaning of the parties is generally explained by the additional use of ordinary words.

(*p*) As farm, meadow, pasture, &c. . Shep. Touch. 93, 94.

CHAPTER I.

•
OF AN ESTATE FOR LIFE.

It seldom happens that any subject is brought frequently to a person's notice, without his forming concerning it opinions of some kind. And such opinions carelessly picked up are often carefully retained, though in many cases wrong, and in most inadequate. The subject of property is so generally interesting, that few persons are without some notions as to the legal rights appertaining to its possession. These notions, however, as entertained by unprofessional persons, are mostly of a wrong kind. They consider that what is a man's own is what he may do what he likes with; and with this broad principle they generally set out on such legal adventures as may happen to lie before them. They begin at a point at which the lawyer stops, or at which indeed the law has not yet arrived, nor ever will; but to which it is still continually approximating. Now the student of law must forget for a time that, if he has land, he may let it, or leave it by his will, or mortgage it, or sell it, or settle it. He must humble himself to believe that he knows as yet nothing about it; and he will find that the attainment of the ample power, which is now possessed over real property, has been the work of a long period of time; and that even now a common purchase deed of a piece of freehold land cannot be explained without going back to the reign of Henry VIII. (a), or an ordinary settlement of land without recourse to the laws of

(a) Stat. 27 Hen. VIII. c. 10, the Statute of Uses.

Edward I. (*b*). That such should be the case is certainly a matter of regret. History and antiquities are, no doubt, interesting and delightful studies in their place; but their perpetual intrusion into modern practice, and the absolute necessity of some acquaintance with them, give rise to much of the difficulty experienced in the study of the law, and to many of the errors of its less studious practitioners.

The first thing then the student has to do is to get rid of the idea of absolute ownership. Such an idea is quite unknown to the English law. No man is in law the absolute owner of lands. He can only hold an estate in them.

Absolute ownership.

The most interesting, and perhaps the most ancient of estates, is an estate for life; and with this we shall begin. Soon after the commencement of the feudal system (*c*), to which, as we have seen, our laws of real

An estate for life.

(*b*) Stat. 13 Edw. I. c. 1, *De Donis Conditionalibus*, to which estates tail owe their origin.

c Upon the continent of Europe, the feudal system of land-holding seems to have come to maturity in the course of the tenth century. It is thought partly to have originated from the grants of land made by the Frank kings of the three preceding centuries out of their own estates to their kinsmen and followers upon the grantees' undertaking to continue faithful. The estates so granted are known as benefices. The question, whether the earliest grants of benefices were only made to the grantee personally, or whether they conferred any right of succession on his heirs, has been the subject of controversy. However this may have been, it is thought that, in point of fact, instances of hereditary succession to benefices, must have occurred from the earliest times, although at first the son or other heir may have been admitted to succeed by favour rather than as of right. It appears, however, that the grant of a benefice was so far personal to the parties concerned therein that, upon the death of the grantor, a renewal or confirmation of the grant by the grantor's successor was necessary in favour of the beneficiary; and that, on the death of the grantee, a similar re-grant was required to be made to his successor. When it became a matter of right that the beneficiary should be confirmed in his benefice and the heir admitted to

property owe so much of their character, an estate for life seems to have been the smallest estate in con-

his ancestor, the form of confirmation or admittance by favour was preserved. Thus, even in the case of the grant of a benefice to a man and his heirs, the grantee came to be regarded as personally taking a life interest only in his benefice; and the right, which the heir acquired was not so much the right to succeed to his ancestor's estate as the right to take up his deceased ancestor's benefice; that is, to receive a re-grant thereof upon payment of a fine called a relief. By the time of the Norman Conquest the right of the heir to succeed to his ancestor's *fief*, or feudal estate, was well established upon the continent of Europe. But, whatever may have been the history of the law of hereditary succession to fiefs upon the continent, it does not appear that feudal tenures were introduced into England by grants of land to be held feudally for the grantee's life only; or that the heir's right of succession was not established in England until a system of granting merely personal interests had given way to a system of granting hereditary estates. To the Normans, who settled in England after the Conquest, a feudal estate would be essentially a hereditary estate. We may also observe that absolute property in land transmissible by inheritance was known to the English law before the Norman Conquest; and so were leases for life. As we have seen, in England the law of feudal tenure seems to have grown up between the time of the Conquest and the reign of Henry II. When we find the law of military tenures developed in this country, we also find hereditary succession well established. But direct evidence that the right of hereditary succession to feudal estates must have become part of English law simultaneously with the principle of tenure, is afforded by the following clauses of the Charter of Liberties issued by Henry I at his coronation (A.D. 1100): —“*Si quis baronum, comitum meorum sive aliorum qui de me tenent, mortuus fuerit, hæres suus non redimet terram suam sicut faciebat tempore fratris mei, sed justa et legitima relevatione relevabit eam. Similiter et homines baronum meorum justa et legitima relevatione relevabunt terras suas de dominis suis.*” “*Omnia placita et omnia debita quæ fratri meo debebantur condono, exceptis rectis firmis meis et exceptis illis quæ pacta erant pro aliorum hæreditatibus vel pro eis rebus quæ justius aliis contingebant. Et si quis pro hæreditate sua aliquid pepigerat, illud condono, et omnes relevationes quæ pro rectis hæreditatibus pactæ fuerant.*” In England, life estates, in early times after the Conquest, seem chiefly to have arisen under leases at money rents mostly granted by ecclesiastical corporations of Church lands. At the same time English law seems to have borrowed from feudal jurisprudence the conception, that a grant of land is essentially meant for the personal enjoyment of the grantee, and

quered lands which the military tenant was disposed to accept (*d*). This estate was inalienable, unless his lord's consent could be obtained (*c*). A grant of lands to A. B. was then a grant to him as long as he could hold them, that is, during his life and no longer (*f*); for feudal donations were not extended beyond the precise terms of the gift by any presumed intent, but were taken strictly (*g*); and, on the tenant's death, the lands reverted to the lord or grantor. If it was intended that the descendants of the tenant should, at his decease, succeed him in the tenancy, this intention was expressed by additional words of grant; the gift being then to the tenant and his heirs, or with other

therefore his interest ceases on his death, the land reverting to the
 unless it should have been expressed in the grant that the
 heirs should succeed to the enjoyment of the land. At the
 present time, a life estate is a very common interest in land. But the
 modern life estates arise under the system, which has prevailed from
 the time of the Commonwealth, of conveying land by settlement, to
 a man for his life, and after his death, to his children and other
 members of his family in succession. See Stubbs, *Const. Hist.* §§ 93,
 94, Vol. I., pp. 250–257, 2nd ed.; Palgrave, *Rise and Progress of the*
English Commonwealth, Vol. I., pp. 509 *et seq.*, Vol. II., pp. cccxi *et*
seq.; 1 Hallam, *Middle Ages*, 159–173; Roth, *Beneficialwesen*, Bk. III.
 Ch. III., Bk. IV. Ch. IV.; Waitz, *Deutsche Verfassungsgeschichte*,
 Vol. II. pp. 225–258, 2nd ed.; Vol. IV. pp. 188–198, 1st ed.;
 Maine, *Early Law and Custom*, pp. 338–351; Kemble, *Saxons in*
England, Bk. I. Ch. XI. and App. E.; Glanvil, lib. 7, 9, 13; Stubbs,
Charters, 100, 101, 2nd ed.; Madox, *Formulare Angl*
Nor. 75, 79, 86, 93, 95, 109–112, 195 *et seq.*, 282 *et seq.*, 494;
day of St. Paul's (Camden Society), pp. xc, 122 *et seq.*; Litt. s. 57.—
 EDITOR'S NOTE.

(*d*) Watk. *Descents*, 107 (113, 4th ed.); 1 Hallam's *Middle Ages*, 160. There seems no good reason to suppose that feuds were at any time held at will, as stated by Blackstone (2 *Black. Com.* 55) and by Butler (*Co. Litt.* 191 a, n. (1), vi. 4).

(*e*) Wright's *Tenures*, 29; 2 *Black. Com.* 57.

(*f*) Bracton, lib. 2, fol. 92 b, par. 6.

(*g*) Wright's *Tenures*, 17, 152. Blackstone's reason for the estate being for life—that it shall be construed to be as large an estate as the words of the donation will bear (2 *Black. Com.* 121)—is quite at variance with this rule of con-

words expressive of the intention. The heir was thus a nominee in the original grant; he took every thing from the grantor, nothing from his ancestor. So that, in such a case, "the ancestor and the heirs took equally as a succession of usufructuaries, each of whom during his life enjoyed the beneficial, but none of whom possessed, or could lawfully dispose of, the direct or absolute dominion of the property" (*h*). The feudal system, however, had not long been introduced into this country before the restriction on alienation began to be relaxed (*i*). Subsequently, by a statute of Edward I. (*j*) the right of every freeman to sell at his own pleasure his lands or tenements, or part thereof, was expressly recognized; at a still later period, the power of testamentary alienation was bestowed (*k*), until at the present day, the right to dispose of property is not only established, but has become inseparable from its possession (*l*). Moreover, the old feudal rule of strict construction has long since given way to the contrary maxim, that every grant is to be construed most strongly against the grantor (*m*). Yet so deeply rooted are the feudal principles of our law of real property, that, in the case before us, the ancient interpretation remains unaltered; and a grant to A. B. simply now confers but an estate for his life (*n*), which estate, though he may part with it if he pleases, will terminate at his death, into whosoever hands it may have come.

A grant to A. B. simply confers only a life estate.

(*h*) Co. Litt. 191 a, n. (1), vi. 5;
1 v. *Wheate*, 1 Wm. Black.
133.

(*i*) Leg. Hen. I. 70; 1 Reeves's
Hist. Eng. Law, 43, 44; Co. Litt.
191 a, n. (1), vi. 6.

(*j*) Stat. 18 Edw. I. c. 1.

(*k*) By stat. 32 Hen. VIII. c. 1,
as to estates in fee simple, and by
stat. 29 Car. II. c. 3, s. 12, as to

estates held for the life of another
person. See 1 Jarm. on Wills,
62, 4th ed.

(*l*) Litt. sect. 360; Co. Litt.
223 a; *Ware v. Cann*, 10 Barn. &
Cress. 433.

(*m*) Shep. Touch. 88.

(*n*) Litt. sect. 283; Co. Litt.
42 a; 2 Black. Com. 121; *Lucas*
v. Brandreth, 28 Beav. 274.

The most remarkable effect of this antiquated rule has been its frequent defeat of the intentions of unlearned testators (*o*), who, in leaving their lands and houses to the objects of their bounty, were seldom aware that they were conferring only a life interest; though, if they extended the gift to the *heirs* of the parties, or happened to make use of the word *estate*, or some other such technical term, their gift or devise included the whole extent of the interest they had power to dispose of. “Generally speaking,” says Lord Mansfield (*p*), “no common person has the smallest idea of any difference between giving a horse and a quantity of land. Common sense alone would never teach a man the difference; but the distinction, which is now clearly established, is this:—If the words of the testator denote only a *description* of the *specific estate* or *land* devised, in that case, if no words of limitation are added, the devisee has only an estate for *life*. But if the words denote the *quantum* of *interest* or property that the testator has in the lands devised, then the *whole* extent of such his *interest* passes by the gift to the devisee. The question, therefore, is always a question of construction, upon the words and terms used by the testator.” Such questions, as may be imagined, have been sufficiently numerous. Happily by the act of parliament for the amendment of the laws with respect to wills (*q*), a construction more accordant with the plain intention of testators is now given in such cases.

This rule has often defeated testator's in-
tention.

If the owner of an estate for his own life should dispose thereof, the new owner will become entitled to an estate for the life of the former. This, in the Norman French, with which our law still abounds, is called an

An estate pur autre vie.

(*o*) 2 Jarman on Wills, 267,
4th ed., and the cases there cited. • (*q*) 7 Will. IV. & 1 Vict. c. 26,
(*p*) In *Hogan v. Jackson*, Cowp. 8. 28.

estate *pur autre vie* (r) : and the person for whose life the land is holden is called the *cestui que vie*. In this case, as well as in that of an original grant, the new owner was formerly entitled only so long as he lived to enjoy the property, unless the grant were expressly extended to his heirs ; so that, in case of the decease of the new owner, in the lifetime of the *cestui que vie*, the land was left without an occupant so long as the life of the latter continued, for the law would not allow him to re-enter after having parted with his life estate (s). No person having therefore a right to the property, anybody might enter on the land ; and he that first entered might lawfully retain possession so long as the *cestui que vie* lived (t). The person who had so entered was called a *general occupant*. If, however, the estate had been granted to a man *and his heirs* during the life of the *cestui que vie*, the heir might, and still may, enter and hold possession ; and in such a case he is called in law a *special occupant*, having a special right of occupation by the terms of the grant (u). To remedy the evil occasioned by property remaining without an owner, it was provided by a clause in a famous statute passed in the reign of King Charles II. (v), that the owner of an estate *pur autre vie* might dispose thereof by his will ; that if no such disposition should be made, the heir, as occupant, should be charged with the debts of his ancestor ; or, in case there should be no special occupant, it should go to his executors or administrators, and be subject to the payment of his debts, of course only during the residue of the life of the *cestui que vie*. In the construction of this enactment a question arose,

General occupant.

Special occupant.

Statute of Frauds.

(r) Litt. sect. 56.

(s) In very early times the law was otherwise. Bract. lib. ii. c. 9, fol. 27 a ; lib. iv. tr. 3. c. 9, par. iv. fol. 263 a ; Fleta, lib. iii. c. 12, s. 6 ; lib. v. c. 5, s. 15.

(t) Co. Litt. 41 b ; 2 Black.

Com. 258.

(u) *Atkinson v. Baker*, 4 T. Rep. 229.

(v) The Statute of Frauds, 29 Car. II. c. 3, s. 12.

whether or not, supposing the owner of an estate *pur autre vie* died without a will, the administrator was to be entitled for his own benefit, after paying the debts of the deceased. An explanatory Act was accordingly passed in the reign of King George II. (x), by which the surplus, after payment of debt, was, in case of intestacy, made distributable amongst the next of kin, in the same manner as personal estate. By the statute Modern for the amendment of the laws with respect to wills (y), " the above enactments were both replaced by more comprehensive provisions to the same effect.

When one person has an estate for the life of another, it is evidently his interest that the *cestui que vie*, or he for whose life the estate is holden, should live as long as possible; and, in the event of his decease, a temptation might occur to a fraudulent owner to conceal his death. In order to prevent any such fraud, it is provided, by an Act of Parliament passed in the reign of Queen Anne (z), that any person having any claim in remainder, reversion or expectancy, may, upon affidavit that he hath cause to believe that the *cestui que vie* is dead, and that his death is concealed, obtain an order from the Lord Chancellor for the production of the *cestui que vie* in the method prescribed by the Act; and, if such order be not complied with, then the *cestui que vie* shall be taken to be dead, and any person claiming any interest in remainder, or reversion, or otherwise, may enter accordingly. The Act, moreover, provides (a), that any person having any estate *pur autre*

cestui may be ordered to be produced.

(x) Stat. 14 Geo. II. c. 20, s. 9; *Isaac*, 4 Myl. & Craig, 11; *Re Lingen*, 12 Sim. 104; *Re Clooney*, see Co. Litt. 41 b, n. (5).

(y) Stat. 7 Will. IV. & 1 Vict. c. 26, ss. 3, 6. 2 Sm. & G. 46; *Re Dennis*, 7 Jur., N. S. 230; *Re Owen*, 10 Ch. D.

(z) Stat. 6 Anne, c. 18. See 166. *Ex parte Grant*, 6 Ves. 512; *Ex parte Whalley*, 4 Russ. 561; (a) Stat. 6 Anne, c. 18, s. 5.

rie, who, after the determination of such estate, shall continue in possession of any lands, without the express consent of the persons next entitled, shall be adjudged a trespasser, and may be proceeded against accordingly.

A tenant for

hath a free-
hold.

Liberum
tenementum.

The owner of an estate for life is called a tenant for life, for he is only a *holder* of the lands according to the feudal principles of our law. A tenant, either for his own life, or for the life of another (*pur autre vie*), hath an estate of *freehold*, and he that hath a less estate cannot have a freehold (*b*). When feudal tenures first became part of English law (*c*), a free holding (*liberum tenementum*) was an estate held by free service, that is, service worthy of a free man, such as military service (*d*). Bracton, who wrote in the reign of Henry III., opposes free tenure to tenure in villenage (*e*), or the holding of land by the performance of servile duties, such as doing field labour for the landlord (*f*). Copyhold tenure, which will be explained further on (*g*), seems to have grown out of tenure in villenage. Thus it is that we now speak of freehold estates as opposed to copyhold interests. But, besides the difference between free tenure and villenage, a distinction was established in Bracton's time between estates of freehold and estates less than freehold, founded upon the uncertainty or certainty of the time of the determination of the estate. Thus, an estate for life, of which the time of determination is uncertain, was regarded as a free holding: whilst an estate by lease for a certain time was considered to be an interest less than a free holding (*h*). This is

(*b*) Litt. s. 57.

(*c*) See *ante*, pp. 3—5, and note (*g*); note (*c*) to p. 21.

(*d*) See Glanvil, lib. xii. c. 1—3.

(*e*) Bracton, lib. iv. c. 28, par. 5, fol. 208 b; lib. iv. c. 38, fol. 224 a.

(*f*) As to the services due from

a *villanus*, or tenant in during the twelfth and thirteenth centuries, see Seebohm, *English Village Community*, Ch. II. sect. 5—12, pp. 40—81.

(*g*) *Post*, Part III.

(*h*) Bracton, lib. ii. c. 9, fol. 27 a; lib. iv. c. 28, fol. 207 a.

probably to be accounted for by the early insignificance and precarious nature of an interest for a term of years (*i*). And it is worthy of remark, that in the earlier periods of our law an estate for a man's own life was the only life estate considered of sufficient importance to be an estate of freehold: an estate for the life of another person was not then reckoned of equal rank (*k*). But this distinction has long since disappeared; and there are now some estates which may not even last a lifetime, but are yet considered in law as life estates, and are estates of freehold. Thus, an estate granted to a woman during her widowhood is in law a life estate, though determinable on her marrying again (*l*). Every life estate also may be determined by the *civil* death of the party, as well as by his natural death; for which reason in conveyances the grant is usually made for the term of a man's *natural* life (*m*). Formerly a person by entering a monastery, and being *professed* in religion, became dead in law (*n*). But this doctrine is now inapplicable; for there is no longer any legal establishment for professed persons in England (*o*), and our law never took notice of foreign professions (*p*). Civil death may, however, occur by outlawry (*q*), which may still take place in criminal proceedings, though in civil proceedings it is now abolished (*r*). Civil death

Estate during widowhood.

Natural life.

(*i*) See *ante*, pp. 9--11, and note *c* to p. 11; Bracton, fol. 224 a; Fleta, lib. vi. c. 49, § 2.

(*k*) Bract. lib. 2, c. 9, fol. 26 b; lib. 4, tr. 3, c. 9, par. 3, fol. 263 a; Fleta, lib. 3, c. 12, s. 6; lib. 5, c. 5, s. 15.

(*l*) Co. Litt. 42 a; 2 Black. Com. 121.

(*m*) Co. Litt. 132 a; 2 Black. Com. 121.

(*n*) 1 Black. Com. 132.

(*o*) Co. Litt. 3 b, n. (7), 132 b, n. (1); 1 Black. Com. 132; stat.

31 Geo. III. c. 32, s. 17; 10 Geo. IV. c. 7, ss. 28-37, 2 & 3 Will. IV. c. 115, s. 4. See also Anstey's Guide to the Laws affecting Roman Catholics, pp. 24-27, 23 & 24 Vict. c. 134, s. 7; *Re Metcalfe's*, 2 De G. & S. 122.

(*p*) Co. Litt. 132 b.

(*q*) 4 Black. Com. 319, 380; Watk. n. 123 to Gilb. Ten.

(*r*) By stat. 42 & 43 Vict. c. 59, s. 3.

was formerly occasioned also by attainder for treason or felony; but all attainders are now abolished (s).

Timber.

Every tenant for life, unless restrained by covenant or agreement, has the common right of all tenants to cut wood for fuel to burn in the house, for the making and repairing of all instruments of husbandry, and for repairing the house, and the hedges and fences (t), and also the right to cut underwood and lop pollards in due course (u). But he is not allowed to cut timber (x), or to commit any other kind of waste (y); either by voluntary destruction of any part of the premises, which is called *voluntary* waste, or by permitting the buildings to go to ruin, which is called *permissive* waste (z). Of late, however, doubts have been thrown on the liability of a tenant for life for waste which is merely permissive; and the Courts of Equity have refused to interfere in the case of a tenant for life, whose estate is equitable only (a). But there appears to be no sufficient ground for doubting the tenant's liability where he has the legal estate vested in himself (b). So a tenant for life cannot plough up ancient meadow land (c); and he is not allowed to dig for gravel, brick, earth or stone,

Waste.

(s) By stat. 33 & 34 Vict. c. 23.
 (t) Co. Litt. 41 b; 2 Black. Com. 35, 122.
 (u) *Phillips v. Smith*, 14 M. & W. 589. As to thinnings of young timber, see *Pidgeley v. Rawling*, 2 Coll. 275; *Bagot v. Bagot*, 32 Beav. 509, 518; *Earl Cowley v. Wellesley*, M. R., Law Rep., 1 Eq. 656; 35 Beav. 635. Explained in *Honywood v. Honynood*, L. R., 18 Eq. 306, 307, 308.

(x) As to what is timber, see *Honywood v. Honynood*, L. R., 18 Eq. 306.

(y) Co. Litt. 53 a; *Bevit*, 2 P. Wms. 241; 2 Black. Com. 122, 281; 3 Black. Com. 224.

(z) Co. Litt. 58 a; *Woodhouse v. Walker*, 5 Q. B. D. 404.

(a) *Pourys v. Blagrace*, 4 De Gex, M. & G. 448, 458; *Warren v. Rudall*, 1 John. & Hem. 1.

(b) *Yellowly v. Goncer*, 11 Ex. 274, 293.

(c) *Simmons v. Norton*, 7 Bing. 648. See *Duke of St. Albans v. Skipwith*, 8 Beav. 354.

in such pits or places as were open and usually dug when he came in (*d*); nor can he open new mines for coal or other minerals, nor cut turf for sale on bog lands; for all such acts would be acts of voluntary waste. But to continue the working of existing mines, or to cut turf for sale in bogs already used for that purpose, is not waste; and the tenant may accordingly carry on such mines and cut turf in such bogs for his own profit (*e*). By an old statute (*f*), the committing of any act of waste was a cause of forfeiture of the thing or place wasted, in case a writ of waste was issued against the tenant for life. But this writ is now abolished (*g*); and a tenant for life is now liable only to damages in an action in the High Court of Justice (*h*) for waste already done, or to be restrained by injunction from cutting the timber or committing any other act of waste which he may be known to contemplate (*i*). If any of the timber were in such an advanced state that it would take injury by standing, the Court of Chancery would allow it to be cut, on the money being secured for the benefit of the persons entitled on the expiration of the life estate; and the Court would allow the interest of the money to be paid to the tenant during his life (*k*). And the Settled Estates Acts, 1856 and 1877 (*l*), em-

Writ of
abolished.

(*d*) Co. Litt. 53 b; *Finer v. —* v. *Slate Quarries Company*, 4 App. Cas. 454.

(*e*) Co. Litt. 54 b; *Toppinger v. Gubbins*, 3 Jones & Lat. 397.

(*f*) The Statute of Gloucester, 6 Edw. I. c. 5; 2 Black. Com. 283; Co. Litt. 218 b, n. 12.

(*g*) By stat. 3 & 4 Will. IV. c. 27, s. 36.

(*h*) Stats. 21 & 22 Vict. c. 27, ss. 2, 3; 36 & 37 Vict. c. 66; 37 & 38 Vict. c. 83; 38 & 39 Vict. c. 77.

(*i*) & 37 Vict. c. —, s. 25, subn. (8).

(*k*) *Tooker v. Annesley*, 5 Sim. 235; *Waldo v. Waldo*, 7 Sim. 261; 12 Sim. 107. *Tollemache v. Tollemache*, 1 Hare, 456; *Consett v. Bell*, 1 You. & Coll. N 569; *Gent v. Harrison*, 517; *Honywood v. Honycwood*, L. R., 18 Eq. 306; *Lounder v. Norton*, V.-C. H., 26 W. R. 826; L. R., 6 Ch. D. 139. See Williams's Conveyancing Statutes, 337.

(*l*) Stats. 19 & 20 Vict. c. 120, s. 11; 40 & 41 Vict. c. 18, s. 16.

powered the Court to authorize a sale of any timber, not being ornamental timber, growing on any settled estates. It is now provided by the Settled Land Act, 1882 (*m*), that, where a tenant for life is impeachable for waste in respect of timber, and there is on the settled land timber ripe and fit for cutting, the tenant for life, on obtaining the consent of the trustees of the settlement or an order of the Court, may cut and sell that timber, or any part thereof. In such a case, three fourth parts of the net proceeds of the sale must be set aside and applied as capital money arising under that Act, and the other fourth part will go as rents and profits (*n*). By the same Act a tenant for life is empowered to make a lease in accordance with the Act for any purpose, whether involving waste or not (*o*). This Act also provides (*p*) that the tenant for life under a settlement and each of his successors in title (*q*) having, under the settlement, a limited estate or interest only in the settled land, and all persons employed by or under contract with the tenant for life or any such successor, may from time to time enter on the settled land, and, without impeachment of waste by any remainderman or reversioner, thereon execute any improvement authorized by this Act (*r*), or inspect, maintain and repair the same, and, for the purposes thereof, on the settled land, do, make, and use all acts, works, and conveniences proper for the execution, maintenance, repair and use thereof, and get and work freestone, limestone, clay, sand and other substances, and make tramways and other ways, and burn and make bricks, tiles

com-
or

improvements
authorized by
the Settled
Land Act,
1882.

(*m*) Stat. 45 & 46 Vict. c 38, s. 35, subs. 1; see Williams's Conveyancing Statutes, 337.

(*n*) Sect. 35, subs. 2; see sects. 2 (9), 21; Williams's Conveyancing Statutes, 292, 325, 337.

(*o*) Sect. 6; see Williams's Conveyancing Statutes, 300.

(*p*) Sect. 29.

(*q*) See Williams's Conveyancing Statutes, 311.

(*r*) See below as to improvements under this Act.

and other things, and cut down and use timber and other trees not planted or left standing for shelter or ornament.

If, however, the estate is given to the tenant by a written instrument (r) expressly declaring his estate to be *without impeachment of waste*, he is allowed to cut timber in a husbandlike manner for his own benefit, to open mines, and commit other acts of waste with impunity (s); but so that he does not pull down or deface the family mansion, or fell timber planted or left standing for ornament, or commit other injuries of the like nature; all of which are termed *equitable waste*; for the Court of Chancery, administering *equity*, restrained such proceedings (t). The Supreme Court of Judicature Act, 1873 (u), now provides that, after the time appointed for the commencement of that Act, namely, the first of November, 1875 (v), an estate for life without impeachment of waste shall not confer, or be deemed to have conferred, upon the tenant for life any legal right to commit waste of the description known as equitable waste, unless an intention to confer such right shall expressly appear by the instrument creating such estate (y).

Without impeachment of

Equitable waste.

New enactment as to equitable waste.

As a tenant for life has merely a limited interest, he could not formerly make any disposition of the lands to take effect after his decease; and, consequently, he could

Leases by tenant for life.

(r) *Douman's case*, 9 Rep. 10 b.

(s) *Levis Boules' case*, 11 Rep. 82 b; 2 Black. Com. 283; *Burges v. Lamb*, 16 Ves. 185; *Cholmeley v. Paxton*, 3 Bing. 211, 10 Barn. & Cresk. 564; *Davies v. Wescomb*, 2 Sim. 425; *Woolf v. Hill*, 2 Swanst. 149; *Waldo v. Waldo*, 12 Sim. 107.

(t) 1 Fonb. Eq. 33 n.; *Margous of Downshire v. Lady Sandys*, 6 Ves. 107; *Burges v. Lamb*, 16 Ves. 183; *Day v. Merry*, 16 Ves.

375 n.; *Wellesley v. Wellesley*, 6 Sim. 497; *Duke of Leeds v. Earl Amherst*, 2 Phil. 117; *Morris v. Morris*, 15 Sim. 505; 3 De Gex & Jones, 323; *Macklethwait v. Macklethwait*, 1 De Gex & Jones, 504; *Baker v. Sebright*, 13 Ch. D. 179.

(u) Stat. 36 & 37 Vict. c. 66.

(v) Stat. 37 & 38 Vict. c. 83.

(y) Stat. 36 & 37 Vict. c. 66, s. 25, subs. (3).

Express
power of

Statutory
powers of
leasing.

Leases by
authority of
the Court.

make no leases to endure beyond his own life. In modern times, however, it was usual expressly to confer upon a tenant for life under a settlement a power of leasing (z) the land settled for a given number of years upon certain specified conditions (a); and a lease made in accordance with such a power remained valid notwithstanding his death. By the Settled Estates Act, 1877 (b), which consolidated the provisions of the Settled Estates Act of 1856 and several amending Acts (c), when the settlement is made after the 1st of November, 1856 (d), the day when the Act of 1856 came in force (e), and does not contain an express declaration to the contrary, every tenant for life may demise the premises or any part thereof (except the principal mansion-house and the demesnes thereof, and other lands usually occupied therewith), for any term not exceeding twenty-one years as to estates in England, and thirty-five years as to estates in Ireland, to take effect in possession at or within one year next after the making thereof; provided that every such demise be made by deed, at the best rent that can reasonably be obtained, without any fine or other benefit in the nature of a fine, not without impeachment of waste, and otherwise in accordance with the Act. Leases may also be made under the same Act by the authority of the Chancery Division of the High Court, on due application, whatever may be the date of the settlement, for terms not exceeding twenty-one years as to England, and thirty-five years as to Ireland, for an agricultural or occupation lease, forty years for a mining lease, or a lease of water, water-mills, way-leaves, water-leaves, or

(z) Powers of leasing are explained, *post*, Part II. Ch. III. sect. 1.

(a) See Williams's Conveyancing Statutes, 301.

(b) Stat. 40 & 41 Vict. c. 18, ss. 46—48, 57.

(c) Stat. 19 & 20 Vict. c. 120,

21 & 22 Vict. c. 77, 27 & 28 Vict. c. 45, 37 & 38 Vict. c. 33, and 39 & 40 Vict. c. 30, repealed by stat. 40 & 41 Vict. c. 18, s. 58.

(d) Stat. 40 & 41 Vict. c. 18, s. 57.

(e) Stat. 19 & 20 Vict. c. 120, ss. 44, 46.

other rights or easements, sixty years for a repairing lease, and ninety-nine years for a building lease, subject to the conditions prescribed by the Act; and where the Court shall be satisfied that it is the usual custom of the district, and beneficial to the inheritance, to grant leases for longer terms, any of the above leases, except agricultural leases, may be granted for such term as the Court shall direct (*f*). The powers of leasing conferred by the Settled Estates Act, 1877, are however now practically superseded by the extensive powers of leasing given to every tenant for life by the Settled Land Act, 1882 (*g*), irrespective of the date of the settlement, under which he holds. Under this Act (*h*), a tenant for life may lease the settled land, or any part thereof, or any easement, right or privilege of any kind, over or in relation to the same, for any purpose whatever, whether involving waste or not, for any term not exceeding (i) in case of a building lease, ninety-nine years; (ii) in case of a mining lease, sixty years; (iii) in case of any other lease, twenty-one years in England or Wales (*i*) and thirty-five years in Ireland (*k*). But the principal mansion-house on any settled land, and the demesnes thereof, and other lands usually occupied therewith, cannot be leased under this Act by the tenant for life without the consent of the trustees of the settlement or an order of the Court (*l*). A tenant for life, when intending to make a lease under this Act, must give due notice of his intention to each of the trustees of the settlement and their solicitor, if known to the tenant for life (*m*). Every lease made under this Act must be by deed, and be made to take effect in

Leases under
Settled Land
Act, 1882.

(*f*) Stat. 40 & 41 Vict. c. 18,
ss. 4—15.

(*g*) Stat. 45 & 46 Vict. c. 38.

(*h*) Sect. 6; see Williams's Con-
veyancing Statutes, 300 *et seq.*

(*i*) See s. 1, subs. 3; Williams's
Statutes, 291, 299.

(*k*) Sect. 65, subs. 10.

(*l*) Sect. 15, see Williams's
Conveyancing Statutes, 317.

(*m*) Sect. 45; Williams's Con-
veyancing Statutes, 344—347;

• see now stat. 47 & 48 Vict. c. 18,
s. 5.

possession not later than twelve months after its date (*n*); must reserve the best rent that can reasonably be obtained, regard being had to any fine taken, and to any money laid out or to be laid out for the benefit of the settled land, and generally to the circumstances of the case (*o*); and must contain a covenant by the lessee for payment of the rent, and a condition of re-entry on the rent not being paid within a time therein specified not exceeding thirty days (*p*). And a counterpart of every such lease must be executed by the lessee and delivered to the tenant for life; of which execution and delivery the execution of the lease by the tenant for life is sufficient evidence (*q*). Building and mining leases are subject to additional special regulations (*r*). Where it is shown to the Court with respect to the district in which any settled land is situate—either (i) that it is the custom for land therein to be leased or granted for building or mining purposes for a longer term or on other conditions than the term or conditions specified in that behalf in this Act, or in perpetuity, or (ii) that it is difficult to make leases or grants for building or mining purposes of land therein, except for a longer term or on other conditions than the term and conditions specified in that behalf in this Act, or except in perpetuity—the Court may, if it thinks fit, authorize generally the tenant for life to make from time to time leases or grants of or concerning the settled land in that district, or parts thereof, for any term or in perpetuity, at fee-farm or other rents, secured by condition of re-entry or otherwise, as in the order of the Court expressed, or may, if it thinks fit, authorize the tenant for life to make any such lease or grant in any particular case (*s*).

(*n*) Stat. 45 & 46 Vict. c. 38,
s. 7, subs. 1.

(*o*) Sect. 7, subs. 2.

(*p*) Sect. 7, subs. 3.

Sect. 7, subs. 4.

(*r*) Sects. 8, 9; see Williams's
Conveyancing Statutes, 303—
306.

(*s*) Sect. 10, subs. 1.

And thereupon the tenant for life, and, subject to any direction in the order of the Court to the contrary, each of his successors in title being a tenant for life, or having the powers of a tenant for life under this Act, may make in any case, or in the particular case, a lease or grant of or affecting the settled land, or part thereof, in conformity with the order (*l*). A fine received on the grant of a lease under any power conferred by this Act must be applied as capital money arising under this Act (*m*). Under a mining lease made under this Act, whether the mines or minerals leased are already opened or in work or not, unless a contrary intention is expressed in the settlement, part of the rent must be set aside and applied as capital money arising under this Act; namely, where the tenant for life is impeachable for waste in respect of minerals, three-fourth parts of the rent, and otherwise one-fourth part thereof; and in every such case the residue of the rent will go as rents and profits (*n*). Powers additional to or larger than the powers conferred by this Act may be given to the tenant for life by the deed under which he holds (*o*); and settlements often contain some relaxation of the restrictions imposed by the Act (*p*). The leasing power of a tenant for life under this Act extends to the making of (i) a lease for giving effect to a contract entered into by any of his predecessors in title for making a lease, which, if made by the predecessor, would have been binding on the successors in title; and (ii) a lease for giving effect to a covenant of re-

Fines on
leases.

Rent on

(*l*) Sect. 10, subs. 2. see Williams's Conveyancing Statutes, 307.

(*m*) Stat. 47 & 48 Vict. c. 18, s. 4; see Williams's Conveyancing Statutes, 292, 302, 325.

(*n*) Stat. 45 & 46 Vict. c. 38, s. 11; see *ante*, pp. 30, 33; Williams's

Statutes, 1

(*o*) See sect. 57.

(*p*) *E.g.*, as to the necessity of giving notice to the trustees, or of setting aside part of the rent on making a mining lease Williams's Conveyancing Statutes, 308, 345—347, 506, 526.

newal, performance whereof could be enforced against the owner for the time being of the settled land; and (iii) a lease for confirming, as far as may be, a previous lease, being void or voidable; but so that every such lease, as and when confirmed, shall be such a lease as might at the date of the original lease have been lawfully granted, under this Act, or otherwise, as the case may require (a).

Emblements.

If a tenant for life should sow the lands, and die before harvest, his executors will have a right to the emblements or crop (b). And the same right will also belong to his under-tenant; with this difference, however, that if the life estate should determine by the tenant's *own act*, as by the marriage of a widow holding during her widowhood, the tenant would have no right to emblements; but the under-tenant being no party to the cesser of the estate, would still be entitled in the same manner as on the expiration of the estate by death (c). And with respect to tenants at rack rent, it is now provided (d), that where the lease or tenancy of any farm or lands held by such a tenant shall determine by the death or cesser of the estate of any landlord entitled for his life, or for any other uncertain interest, instead of claims to emblements, the tenant shall continue to hold and occupy such farm or lands until the expiration of the then current year of his tenancy, and shall then quit upon the terms of his lease or holding, in the same manner as if such lease or tenancy were then determined by effluxion of time, or other lawful means, during the continuance of his landlord's estate; and the succeeding owner will be entitled to a fair proportion of the rent from the death or cesser of the estate

Enactment as to tenants at rack rent.

(a) Stat. 45 & 46 Vict. c. 38, s. 12; see Williams's Conveyancing Statutes, 309—312.

(b) 2 Black. Com. 122; see

(c) 2 Black. Com. 123, 124.

(d) Stat. 14 & 15 Vict. c. 25, s. 1; *Haines v. Welch*, L. R., 4 C. P. 91.

of his predecessor to the time of the tenant's so quitting. And the succeeding owner and the tenant respectively will, as between themselves and as against each other, be entitled to all the benefits and advantages, and be subject to the terms, conditions and restrictions to which the preceding landlord and the tenant respectively would have been entitled and subject in case the lease or tenancy had determined in the manner before mentioned at the expiration of the current year; and no notice to quit shall be necessary from either party to determine such holding.

As a consequence of the determination of the estate of a tenant for life the moment of his death, it was held in old times, that if such a tenant had let the lands reserving rent quarterly or half-yearly, and died between two rent days, no rent was due from the under-tenant to anybody from the last rent day till the time of the decease of the tenant for life. But in the reign of King George II. a remedy for a proportionate part of the rent, according to the time such tenant for life lived, was given by Act of Parliament to his executors or administrators (*e*). Formerly, also, when a tenant for life had a power of leasing (*f*), and let the lands accordingly, reserving rent periodically, his executors had no right to a proportion of the rent, in the event of his decease between two quarter days: and, as rent is not due till midnight of the day on which it is made payable, if the tenant for life had died even on the quarter day, but before midnight, his executors lost the quarter's rent, which went to the person next entitled (*g*). But by a modern Act of Parliament (*h*), the executors

Apportionment of rent.

(*e*) Stat. 11 Geo. II. c. 19, s. 15, explained by stat. 4 & 5 Will. IV. c. 22, s. 1. See *Ex parte Smyth*, 1 Swanst. 337, and the learned editor's note.

(*f*) See *ante*, p. 34.

(*g*) *Norris v. Harrison*, 2 Mad. 268.

(*h*) Stat. 4 & 5 Will. IV. c. 22, s. 2; *Lock v. De Burgh*, 4 De Gex

Apportion-
ment Act,
1870.

and administrators of any tenant for life who had granted a lease since the 16th of June, 1834, the date of the Act, might claim an apportionment of the rent from the person next entitled, when it should become due. This Act, however, did not apply unless the demise were made by an instrument in writing (*i*). But the Apportionment Act, 1870 (*k*), now provides (*l*), that after the passing of that Act, which took place on the 1st of August, 1870, all rents and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise) shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly.

Draining.

By an Act of the present reign (*m*) tenants for life, and some other persons having limited interests, were empowered to apply to the Court of Chancery for leave to make any permanent improvements by *draining* the lands with tiles, stones, or other durable materials, or by warping, irrigation or embankment in a permanent manner, or by erecting thereon any buildings of a permanent kind incidental or consequential to such draining, warping, irrigation or embanking, and immediately connected therewith (*n*). And if, in the opinion of the Court, such improvements would have been beneficial to all persons interested (*o*), the money expended in making such improvements, or in obtain-

& Smale, 470; *Plummer v. White-*
, Johnson, 585; *Llewellyn v.*
, M. R., Law Rep., 2 Eq. 27;
35 Beav. 591.

(*i*) See *Cattley v. Arnold*, V.-C.
W., 5 Jur., N. S. 361; 7 W. Rep.
245; 1 Johns. & Hem. 651; *Mills*
v. Trumper, L. R., 4 Ch. 320.

(*k*) Stat. 33 & 34 Vict. c. 35;
; *v. Pedley*, M. R., L. R.

19 Eq. 271; *Constable v. Con-*
stable, 11 Ch. D. 681.

(*l*) Sect. 2.

(*m*) Stat. 8 & 9 Vict. c. 56,
repealing a prior Act for the
same purpose, stat. 3 & 4 Vict.
c. 55.

(*n*) Sect. 3.

(*o*) Sects. 4, 5.

ing the authority of the Court, was to be charged on the inheritance of the lands, with interest at such rate as should have been agreed on; not exceeding five per cent. per annum, payable half-yearly (*p*); the principal money to be repaid by equal annual instalments, not less than twelve nor more than eighteen in number; or in the case of buildings, by equal annual instalments, not less than fifteen nor more than twenty-five in number (*q*). And under the provisions of more recent Acts of Parliament (*r*), called the Public Money Drainage Acts, tenants for life and other owners of land may obtain advances from government for works of drainage which may be completed within five years (*s*), such advances to be repaid by a rent-charge on the land, after the rate of 6*l*. 10*s*. rent-charge for every 100*l*. advanced, and to be payable for the term of twenty-two years (*t*). By another Act of Parliament called the Private Money Drainage Act, 1849 (*u*), the owner of any land in Great Britain or Ireland was empowered to borrow or advance money for the improvement of such land by works of drainage; such money, with interest not exceeding five per cent. per annum, to be charged on the inheritance of the land, in the shape of a rent-charge, for the term of twenty-two years. This Act, however, is now repealed by the Improvement of Land Act, 1864 (*x*), which gives a very wide definition to the phrase "improvement of land," and contains provisions for facilitating the raising of money by way of rent-charge for that purpose. The rate of interest to be charged is not to exceed five per cent. per annum,

(*p*) Sect. 6.(*q*) Sect. 9.

(*r*) Stat. 9 & 10 Vict. c. 101, explained and amended by stat. 10 & 11 Vict. c. 11, 11 & 12 Vict. c. 119, 13 & 14 Vict. c. 31, and 19 & 20 Vict. c. 9.

(*s*) Stat. 10 & 11 Vict. c. 11, s. 7.

(*t*) Stat. 9 & 10 Vict. c. 101, s. 34.

(*u*) Stat. 12 & 13 Vict. c. 100, amended by stat. 19 & 20 Vict. c. 9.

(*x*) Stat. 27 & 28 Vict. c. 114.

Railways or
canals.

Limited
Owners' Resi-
dences Act,
1870, Amend-
ment Act,
1871.

and the term for repayment is not to exceed twenty-five years (*y*). These loans are under the superintendence of the Land Commissioners for England (*z*), and in Ireland under that of the Commissioners for Public Works in Ireland. But the authority to issue certificates of the redemption of the loans of public money belongs to the Board of Inland Revenue (*a*). The Improvement of Land Act, 1864, contains provisions, amongst other things, for charging settled lands with money subscribed for the construction of railways or navigable canals upon or near to the lands, and which will improve or benefit them (*b*). An Act, styled the "Limited Owners' Residences Act, 1870, Amendment Act, 1871" (*c*), now provides (*d*) that the following shall be improvements within the meaning of the Improvement of Land Act, 1864, namely, the erection of a mansion-house and such other usual and necessary buildings, outhouses and offices as are commonly appurtenant thereto and held and enjoyed therewith, and the completion of any mansion-house and such appurtenances as aforesaid, and the improvement of and addition to any mansion-house and such appurtenances as aforesaid already erected, and the improvement of and addition to any house which is capable of being converted into a mansion-house suitable to the estate on which the same stands, so as such improvement and addition be of a permanent nature; provided that every such mansion-house so erected or enlarged or converted is suitable to the estate on which it stands as a residence for the owner of such estate (*e*). But the sum charged

(*y*) Sect. 26.

(*z*) Sec stat. 45 & 46 Vict. c. 38,
s. 48.

(*a*) Stat. 19 & 20 Vict. c. 9,
s. 10.

(*b*) Stat. 27 & 28 Vict. c. 114,
ss. 78 *et seq.*

(*c*) Stat. 34 & 35 Vict. c. 84.

(*d*) Sect. 3.

(*e*) The term "estate" in this section includes all lands upon which any of such improvements is proposed to be made, and any other lands in the neighbourhood of the same settled to the same uses.

on any estate under settlement in respect of mansion and other buildings before mentioned is not to exceed two years' net rental of the whole estate (*f*). An Act which bears the title of "The Limited Owners' Reservoirs and Water Supply Further Facilities Act, 1877" (*g*), adds the erection of reservoirs and other works of a permanent character for the supply of water to the list of improvements authorized by the Improvement of Land Act, 1864 (*h*). The enumeration of improvements contained in the latter Act is now further extended so as to comprise all improvements authorized by the Settled Land Act, 1882 (*i*). Res
and wa
supply.

In addition to the facilities so given for raising money to pay for the improvement of land, capital money arising from the sale of settled land or otherwise under the Settled Land Act, 1882 (*k*), may now be applied in payment for any improvement authorized by that Act (*l*). The list of improvements authorized by the Act is given in the note (*m*). Where the tenant for life is desirous that Improvements under
Settled Land
Act, 1882.

Tenant for

(*f*) Stat. 33 & 34 Vict. c. 56, s. 4. see Williams's Conveyancing Statutes, 292.

(*g*) Stat. 40 & 41 Vict. c. 31.

(*h*) Stat. 27 & 28 Vict. c. 114.

(*i*) Stat. 45 & 46 Vict. c. 38, s. 30. (*l*) Sect. 21 (*in*) but not in redeeming rent-charges created under the Improvement of Land Act, 1864. *Re Knatchbull's Settled Estate*, 27 Ch. D. 349.

(*k*) Stat. 45 & 46 Vict. c. 38.

(*m*) (Sect. 25.) Improvements authorized by this Act are the making or execution on, or in connexion with, and for the benefit of settled land, of any of the following works, or of any works for any of the following purposes, and any operation incident to or necessary or proper in the execution of any of those works, or necessary or proper for carrying into effect any of those purposes, or for securing the full benefit of any of those works or purposes namely :—

(i) Drainage, including the straightening, widening, or deepening of drains, streams, and watercourses :

(ii) Irrigation ; warping :

(iii) Drains, pipes, and machinery for supply and distribution of sewage as manure :

(iv) Embanking or weiring from a river or lake, or from the sea, or a tidal water :

(v) Groynes ; sea walls ; defences against water :

life must first
submit a
scheme to the
trustees or the
Court.

Certificate or
order of the
Court
can be ap-
plied.

capital money arising under this Act shall be applied in or towards payment for an improvement authorized by this Act, he may submit for approval to the trustees of the settlement, or to the Court, as the case may require, a scheme for the execution of the improvement, showing the proposed expenditure thereon (*n*). Where the capital money to be expended is in the hands of trustees, then, after a scheme is approved by them, the trustees

(vi) Inclosing ; straightening of fences ; redivision of fields :

(vii) Reclamation ; dry warping :

(viii) Farm-roads ; private-roads ; roads or streets in villages, or towns :

(ix) Clearing ; trenching ; planting :

(x) Cottages for labourers, farm servants, and artisans, employed on the settled land or not :

(xi) Farmhouses, offices and outbuildings, and other places for farm

(xii) Saw mills, scutch mills, and other mills, water wheels, engines, and kilns, which will increase the value of the settled land for agricultural purposes or as woodland or otherwise :

(xiii) Reservoirs, tanks, conduits, watercourses, pipes, wells, ponds, shafts, dams, weirs, sluices, and other works and machinery for supply and distribution of water, for agricultural, manufacturing, or other purposes, or for domestic or other consumption :

(xiv) Tramways ; railways ; canals ; docks :

(xv) Jetties, piers, and landing places on rivers, lakes, the sea, or tidal waters, facilitating transport of persons and of agricultural stock and produce, and of manure and other things required for agricultural purposes, and of minerals and of things required for mining purposes :

(xvi) Markets and market-places :

(xvii) Streets, roads, paths, squares, gardens, or other open spaces for the use, gratuitously or on payment, of the public or of individuals, or for dedication to the public, the same being necessary or proper in connexion with the conversion of land into building land :

(xviii) Sewers, drains, watercourses, pipe-making, fencing, paving, brick-making, tile-making, and other works necessary or proper in connexion with any of the objects aforesaid :

(xix) Trial pits for mines, and other preliminary works necessary or proper in connexion with development of mines :

(xx) Reconstruction, enlargement or improvement of any of those works.

(*n*) Sect. 26, sub. 1.

may apply that money in or towards payment for the whole or part of any work or operation comprised in the improvement, on (i) a certificate of the Land Commissioners certifying that the work or operation, or some specified part thereof, has been properly executed, and what amount is properly payable by the trustees in respect thereof, which certificate shall be conclusive in favour of the trustees as an authority and discharge for any payment made by them in pursuance thereof; or (ii) a like certificate of a competent engineer or able practical surveyor nominated by the trustees and approved by the Commissioners, or by the Court, which certificate shall be conclusive as aforesaid; or (iii) an order of the Court directing or authorizing the trustees to so apply a specified portion of the capital money (o). Where the capital money to be expended is in Court, then, after a scheme is approved by the Court, the Court may, if it thinks fit, on a report or certificate of the Commissioners, or of a competent engineer or able practical surveyor approved by the Court, or on such other evidence as the Court thinks sufficient, make such order and give such directions as it thinks fit for the application of that money, or any part thereof, in or towards payment for the whole or part of any work or operation comprised in the improvement (p). The Act further provides that the tenant for life, and each of his successors in title (q) having, under the settlement, a limited estate or interest only in the settled land, shall, during such period, if any, as the Land Commissioners by certificate in any case prescribe, maintain and repair, at his own expense, every improvement executed under the foregoing provisions of this Act, and where a building or work in its nature insurable against damage by fire is comprised in the improvement, shall insure and keep

Tenant for
improvements
executed under
the Act.

To insure
in

(o) Sect. 26, subs. 2.
Sect. 26, subs. 3.

(q) See Williams's Conveyancing Statutes, 311.

Not to cut
timber
planted as an
improvement.

To report to
Land Com-
missioners, if
required.

insured the same, at his own expense, in such amount, if any, as the Commissioners by certificate in any case prescribe (*r*). The tenant for life, or any of his successors as aforesaid, shall not cut down or knowingly permit to be cut down, except in proper thinning, any trees planted as an improvement under the foregoing provisions of this Act (*s*). And the tenant for life, and each of his successors as aforesaid, shall from time to time, if required by the Commissioners, on or without the suggestion of any person having, under the settlement, any estate or interest in the settled land in possession, remainder or otherwise, report to the Commissioners the state of every improvement executed under this Act, and the fact and particulars of fire insurance, if any (*t*). The Commissioners may vary any certificate made by them under this section, in such manner or to such extent as circumstances appear to them to require, but not so as to increase the liabilities of the tenant for life, or any of his successors as aforesaid (*u*). If the tenant for life, or any of his successors as aforesaid, fails in any respect to comply with the requisitions of this section, or does any act in contravention thereof, any person having, under the settlement, any estate or interest in the settled land in possession, remainder or reversion, shall have a right of action, in respect of that default or act, against the tenant for life; and the estate of the tenant for life, after his death, shall be liable to make good to the persons entitled under the settlement any damages occasioned by that default or act (*x*).

Other im-
provements.

The same Act provides (*y*) that the tenant for life may join or concur with any other person interested in executing any improvement authorized by the Act, or in contributing to the cost thereof. In all other respects,

(*r*) Sect. 28, subs. 1.

(*s*) Sect. 28, subs. 2.

(*t*) Sect. 28, subs. 3.

(*u*) Sect. 28, subs. 4.

(*x*) Sect. 28, subs. 5.

(*y*) Sect. 27.

improvements which a tenant for life may wish to make must be paid for out of his own pocket (2).

By statutes of the years 1830 and 1839 tenants for life under wills were empowered in certain cases to convey, under the direction of the Court of Chancery, the whole estate in the lands of which they were tenants for life. Such conveyances are made only when the concurrence of the other parties cannot be obtained, and a sale or mortgage of the lands is required for the payment of the debts of the testator (a). These powers, however, are given to the tenant for life for the sake of making a title to the property; and are more for the benefit of the creditors of the late testator, than for the advantage of the tenant for life, who is, in these cases, merely the instrument for carrying into effect the decree of the Court. The powers given by these Acts are now in a great measure superseded by the provisions of the Trustee Acts, 1850 and 1852 (b). For his own benefit, a tenant for life can sell or mortgage his own life interest only in the land, which he holds. Formerly a sale of all the estate in land, which a man held for his life, could only be made with the concurrence of those who would become entitled thereto after his death. When, however, land was conveyed to a tenant for life, and after his death to others, by a deed of settlement drawn in the modern form (c), it was usual by the same

of land
decreed to
sold or mort-
gaged to pay
a testator's
debts

(2) *Nairn v. Marjoribanks*, 3 Russ. 582; *Hubbert v. Cooke*, 1 Stu. 552; *Caldecott v. 1, 2 Hare*, 144; *Horlock v. Smith*, 17 Beav. 572; *Dunne v. Dunne*, 7 De Gex. M. & G. 207; *Dent v. Dent*, 30 Beav. 363.

(a) Stats. 11 Geo. IV. & 1 Will. IV. c. 47, s. 12; 2 & 3 Vict. c. 60.

(b) Stats. 13 & 14 Vict. c. 60, s. 29; 15 & 16 Vict. c. 55, s. 1.

c. The practice of settlements of land in the form appears to date from the time of the Commonwealth, and the practice of inserting a power of sale in settlements seems to have been developed during the eighteenth century; see Papers read before the Juridical Society, Vol. I. p. 45 (a paper written by the late author); Butler's note (v. 4, b) to Co. Litt. 290 b;

Sale of settled
estate.

to empower trustees, with the consent of the tenant for life, to sell all or part of the land settled and apply the purchase-money in paying off incumbrances on any part of the settled land, which remained unsold, or in buying other land to be settled in the same way. In the year 1856 an Act was passed, to which we have already referred (*d*), to facilitate leases and sales of settled estates (*e*). This Act, and the Acts by which it was amended, have now been repealed, amended and consolidated by the Settled Estates Act, 1877 (*f*). Under this Act (*g*), an order of the Court may be obtained, upon application in the Chancery Division, for the sale of any settled estate, if the Court deem it proper and consistent with a due regard for the interest of all parties entitled. But the powers conferred on the Court by this Act are not to be exercised if an express declaration that they shall not be exercised is contained in the settlement (*h*). This Act (*i*) only authorized the application of money received on any sale effected thereunder in the redemption of land tax, the discharge of incumbrances, the purchase of land to be settled in the same way as the land sold, or payment to any person becoming absolutely entitled: but money so received may now be applied in the same manner as capital money arising under the Settled Land Act, 1882 (*k*).

on
conveyancing, 3rd
A.D. 1699), pp. 130, 148, 171,
332; Lilly's Practical Convey-
ancer (1719), p. 568; 2 Hors-
man's Conveyancing (1744), pp.
217, 475; 3 Wood's Conveyanc-
ing (3rd ed. by Powell, 1793),
p. 641; 7 Barton's Conveyancing
(3rd ed. 1824), p. 248; 3 David-
son's Precedents in Conveyancing
(3rd ed. 1873), pp. 263—269, 556.
c. p. 34.

(*e*) Stat. 19 & 20 Vict. c. 120,
amended by stats. 21 & 22 Vict.
c. 77, 27 & 28 Vict. c. 45, 37 &
38 Vict. c. 33, and 39 & 40 Vict.
c. 30.

(*f*) Stat. 40 & 41 Vict. c. 18.

(*g*) See sects. 16, 18—37; *Re
Harvey's Settled Estate*, 21 Ch. D.
123.

(*h*) Sect. 38.

(*i*) Sect. 34.

(*k*) Stat. 45 & 46 Vict. c. 38,
ss. 32, 33.

OF AN ESTATE FOR LIFE.

At the present time, however, the sale of all the estate in any settled land may be effected under the Settled Land Act, 1882 (*l*), by a tenant for life in possession thereof, without the necessity of applying for an order of the Court, and independently of any express power of sale or of the concurrence of those who would become entitled upon his death (*m*). This Act empowers a tenant for life in possession of land under any settlement (*n*) to sell the settled land, or any part thereof, or any easement, right or privilege of any kind over or in relation to the same; and also to make an exchange of the settled land, or any part thereof, for other land, including an exchange in consideration of money paid for equality of exchange (*o*). But the principal mansion-house on any settled land, and the demesnes thereof, and other lands usually occupied therewith, cannot be sold under this Act without the consent of the trustees of the settlement, or an order of the Court (*p*). The proceeds of any sale made under this Act and any money agreed to be paid for equality of any exchange effected under this Act must not be paid to the tenant for life, but must be applied as capital money arising under this Act (*q*). The application of capital money arising under this Act is regulated by the following provisions:—

(Sect. 21.) Capital money arising under this Act, subject to payment of claims properly payable thereout, and to application thereof for any special authorized object for which the same was raised, shall, when received, be invested or otherwise applied wholly in

(*l*) Stat. 45 & 46 Vict. c. 38.

(*m*) See *Wheclwright v. Walker*, 23 Ch. D. 752.

(*n*) See sect. 2; Williams's Conveyancing Statutes, 291—294, 297.

(*o*) Sect. 3.

W.R.P.

(*p*) Sect. 15; see Williams's Conveyancing Statutes, 317, 318; *Re Brown's Will*, 27 Ch. D. 179.

q See sect. 2, subn. 9; Williams's Conveyancing Statutes, 292, 297, 298.

one, or partly in one, and partly in another or others of the following modes (namely) :

- (i) In investment on government securities, or on other securities on which the trustees of the settlement are by the settlement or by law (*r*) authorized to invest trust money of the settlement, or on the security of the bonds, mortgages, or debentures, or in the purchase of the debenture stock, of any railway company in Great Britain or Ireland incorporated by special Act of Parliament, and having for ten years next before the date of investment paid a dividend on its ordinary stock or shares, with power to vary the investment in or for any other such securities :
- (ii) In discharge, purchase or redemption of incumbrances affecting the inheritance of the settled land, or other the whole estate the subject of the settlement, or of land-tax, rent-charge in lieu of tithe, Crown rent, chief rent, or quit rent, charged on or payable out of the settled land :
- (iii) In payment for any improvement authorized by this Act (*s*) :
- (iv) In payment for equality of exchange or partition of settled land :
- (v) In purchase of the seignory of any part of the settled land, being freehold land, or in purchase of the fee simple of any part of the settled land, being copyhold or customary land :
- (vi) In purchase of the reversion or freehold in fee of any part of the settled land, being leasehold land held for years, or life, or years determinable on life :

(*r*) As to the securities upon which trustees are by law authorized to invest trust-money, see Williams's Conveyancing Statutes, 206—209.

(*s*) *Ante*, pp. 43—47.

- (vii) In purchase of land in fee simple, or of copyhold or customary land, or of leasehold land held for sixty years or more unexpired at the time of purchase, subject or not to any exception or reservation of or in respect of mines or minerals therein, or of or in respect of rights or powers relative to the working of mines or minerals therein or in other land :
- (viii) In purchase, either in fee simple, or for a term of sixty years or more, of mines and minerals convenient to be held or worked with the settled land, or of any easement, right or privilege convenient to be held with the settled land for mining or other purposes :
- (ix) In payment to any person becoming absolutely entitled or empowered to give an absolute discharge :
- (x) In payment of costs, charges, and expenses of or incidental to the exercise of any of the powers, or the execution of any of the provisions of this Act :
- (xi) In any other mode in which money produced by the exercise of a power of sale in the settlement is applicable thereunder.

(Sect. 22, sub-s. 1.) Capital money arising under this Act shall, in order to its being invested or applied as aforesaid, be paid either to the trustees of the settlement or into Court, at the option of the tenant for life, and shall be invested or applied by the trustees, or under the direction of the Court, as the case may be, accordingly.

(Sub-s. 2.) The investment or other application by the trustees shall be made according to the direction of the tenant for life, and in default thereof, according to the discretion of the trustees, but in the last-mentioned case subject to any consent required or direction given by the settlement with respect to the investment or other

application by the trustees of trust money of the settlement; and any investment shall be in the names or under the control of the trustees.

(Sub-s. 3.) The investment or other application under the direction of the Court shall be made on the application of the tenant for life, or of the trustees.

(Sub-s. 4.) Any investment or other application shall not during the life of the tenant for life be altered without his consent.

(Sub-s. 5.) Capital money arising under this Act while remaining uninvested or unapplied, and securities on which an investment of any such capital money is made, shall, for all purposes of disposition, transmission, and devolution, be considered as land, and the same shall be held for and go to the same persons successively, in the same manner and for and on the same estates, interests, and trusts, as the land wherefrom the money arises would, if not disposed of, have been held and have gone under the settlement.

(Sub-s. 6.) The income of those securities shall be paid or applied as the income of that land, if not disposed of, would have been payable or applicable under the settlement.

(Sub-s. 7.) Those securities may be converted into money, which shall be capital money arising under this Act.

**Sale by tenant
for life:
notice.**

A tenant for life, when intending to make, under this Act, must give due notice of his intention to each of the trustees of the settlement and to the solicitor for the trustees, if known to the tenant for life (*f*); and he must in other respects comply with the provisions of the Act (*u*). For the purpose of carrying into effect the powers of sale, leasing and other powers given by

(*f*) See sect. 45; stat. 47 & 48 Vict. c. 18, s. 5; Williams's Con- Statutes, 345—347.

(*u*) See stat. 45 & 46 Vict. c. 38, ss. 4, 53; Williams's Conveyancing Statutes, 298, 355.

this Act, the tenant for life is empowered to convey the settled land by deed for all the estate and interest, which is the subject of the settlement, or for any less estate or interest, as may be required (x). Such a deed, to the extent and in the manner to and in which it is expressed or intended to operate and can operate under this Act, is effectual to pass the land conveyed, or the easements, rights or privileges created, discharged from all the limitations, powers and provisions of the settlement, and from all estates, interests and charges subsisting or to arise thereunder, but subject to and with the exception of—(i) all estates, interests and charges having priority to the settlement; and (ii) all such other, if any, estates, interests, and charges as have been conveyed or created for securing money actually raised at the date of the deed; and (iii) all leases and grants at fee-farm rents or otherwise, and all grants of easements, rights of common or other rights or privileges granted or made for value in money or moneys worth, or agreed so to be, before the date of the deed, by the tenant for life, or by any of his predecessors in title, or by any trustees for him or them, under the settlement or under any statutory power, or being otherwise binding on the successors in title of the tenant for life (y).

Tenant for
life's power of

A tenant for life is thus enabled to sell and convey all the estate in the land which he holds; and to have the purchase-money either invested in money securities, of which he will be entitled to receive the income during his life, or applied in any other manner authorized by the Act (z). For further information as to the powers conferred by this very important statute, which must necessarily be studied by every intending legal practitioner, the reader is referred to the text of

1. 20, subs. 1: Williams's Conveyancing Statutes, 321, 322.
 2. See *Re Chaytor's Settled Estate Act*, 25 Ch. D. 651.
 (y) Sect. 20, subs. 2: see Williams's Conveyancing Statutes, 321, 322.

the Act itself, and to the notes thereto contained in the editor's "Conveyancing Statutes." The Act has been amended in certain particulars by the Settled Land Act, 1884 (*a*).

Persons
the
of a
nt for life
under the
Settled Land
Act, 1882.

It is important to notice that all the powers of a tenant for life under the Settled Land Act, 1882, are by that Act (*b*) expressly conferred on each of the following persons, when his estate or interest is in possession :—

Tenant *pur*
autre vie.

(a) A tenant for years determinable on life, not holding merely under a lease at a rent ;

(b) A tenant for the life of another, not holding merely under a lease at a rent ;

(c) A tenant for his own or any other life, or for years determinable on life, whose estate is liable to cease in any event during that life, whether by expiration of the estate, or by conditional limitation or otherwise, or to be defeated by an executory limitation, gift or disposition over, or is subject to a trust for accumulation of income for payment of debts or other purpose ;

(d) A person entitled to the income of land under a trust or direction for payment thereof to him during his own or any other life, whether subject to expenses of management or not, or until sale of the land, or until forfeiture of his interest therein on bankruptcy or other event (*c*).

Infant tenant
for life.

Where a tenant for life, or a person having the powers of a tenant for life under this Act, is an infant, or an infant would, if he were of full age, be a tenant for life, or have the powers of a tenant for life under this Act, the powers of a tenant for life under this Act may be exercised on his behalf by the trustee of the

(a) Stat. 47 & 48 Vict. c. 18.

(c) See *Re Jones*, 24 Ch. D. 583 ;

(b) Stat. 45 & 46 Vict. c. 38, 26 Ch. D. 736.

s. 58, subs. 1 (iv, v, vi, ix).

settlement, and if there are none, then by such person and in such manner as the Court, on the application of a testamentary or other guardian or next friend of the infant, either generally or in a particular instance, orders (*d*).

The following provision is contained in the Settled Land Act, 1882 (*g*), and is very important to tenants for life and other owners of limited estates:—

Proceedings
for protection
of land settled
or
settled.

(Sect. 36.) The Court may, if it thinks fit, approve of any action, defence, petition to Parliament, parliamentary opposition, or other proceeding taken or proposed to be taken for protection of settled land, or of any action or proceeding taken or proposed to be taken for recovery of land being or alleged to be subject to a settlement, and may direct that any costs, charges, or expenses, incurred or to be incurred in relation thereto, or any part thereof, be paid out of property subject to the settlement (*f*).

The Settled Estates Act, 1877 (*g*), contained a somewhat similar provision, which is now repealed (*h*). Tenants for life, who have taken legal proceedings, by bringing or defending actions, for the protection of the estates comprised in their settlement, without having first obtained the sanction of the Court, have obtained orders from the Court that the cost of such proceedings might be defrayed out of the proceeds of sale of part of the settled estates, under the equitable jurisdiction of the Court, irrespective of the provisions of the Settled Estates Act, 1877, or of the above enactment (*i*).

In addition to estates for life expressly created by the acts of the parties, there are certain life interests,

Sect. 60; *Re Prier, Leighton* s. 17.
v. *Prier*, 27 Ch. D. 552. (*h*) By stat. 45 & 46 Vict. c. 38,
(*e*) Stat. 45 & 46 Vict. c. 38. s. 64.
(*f*) See sect. 47. (*i*) *Re Earl De la Warr's*.
Stat. 40 & 41 Vict. c. 18, 16 Ch. D. 587.

created by construction and operation of law, possessed by husbands and wives in each other's land. These interests will be spoken of in a future chapter. There are also certain other life estates held by persons subject to peculiar laws; such as the life estates held by beneficed clergymen. These estates are exceptions from the general law; and a discussion of them, in an elementary work like the present, would tend rather to confuse the student than to aid him in his grasp of those general principles, which it should be his first object to comprehend.

CHAPTER II.

OF AN ESTATE TAIL.

THE next estate we shall notice is an estate tail, or an estate given to a man *and the heirs of his body*. This is such an estate as will, if left to itself, descend, on the decease of the first owner, to all his lawful issue,—children, grand-children, and more remote descendants, so long as his posterity endures,—in a regular order and course of descent from one to another: and, on the other hand, if the first owner should die without issue, his estate, if left alone, will then determine. An estate tail may be either *general*, that is, to the heirs of his body generally and without restriction, in which case the estate will be descendible to every one of his lawful posterity in due course; or *special*, when it is restrained to certain heirs of his body, and does not go to all of them in general; thus, if an estate be given to a man and the heirs of his body by a particular wife; here none can inherit but such as are his issue by the wife specified. Estates tail may be also in *tail male*, or in *tail female*; an estate in *tail male* cannot descend to any but males, and male descendants of males; and cannot, consequently, belong to any one who does not bear the surname of his ancestor from whom he inherited: so an estate in *tail female* can only descend to females, and female descendants of females (a). Special estates tail, confined to the issue by a particular wife, are not now common: the most usual kinds of estates tail now given are estates in tail general, and in tail male. Tail female scarcely ever occurs.

Estate tail.

General or special.

Male or female.

(a) Litt. ss. 13, 14, 15, 16, 21; 2 Black. Com. 113, 114.

Donee in tail. The owner of an estate tail is called a *donee* in tail, and the person who has given him the estate tail is called the *donor*. And here it may be remarked, that such correlative words as *donor* and *donee*, *lessor* and *lessee*, and many others of a like termination, are used in law to distinguish the person from whom an act proceeds, from the person for or towards whom it is done.

Tenant in tail. The owner of an estate tail is also called a *tenant in tail*, for he is as much a *holder* as a tenant for life. But an estate tail is a larger estate than an estate for life, as it may endure so long as the first owner of the estate has any issue of the kind mentioned in the gift. It is consequently an estate of *freehold* (*b*). We shall now proceed to give a short history of this estate; in doing which it will be necessary to advert to the origin and progress of the general right of alienation of lands.

An estate tail is a freehold.

Feudal tenancies hereditary.

As we have seen (*c*), the transmission of property in land by inheritance formed part of the laws of England before the Norman Conquest (*d*); and the law of hereditary succession to feudal estates seems to have been established in this country as soon as the principle of feudal tenure had been grafted on English law. Accordingly, we find that, in the time of Henry II., the eldest or only son of a tenant by military service had the first right to succeed as heir to his deceased father's estate: but if the late tenant had left no son or other issue, collateral relations were admitted to succeed as heirs (*e*). So that an estate, which had been granted to a man and his heirs, descended, on his death, not only to his offspring, but also, in default of offspring, to his other relations in a defined order of succession. Hence if it were wished to confine the inheritance to the offspring of the donee, it became necessary to limit

(*b*) Litt. s. 57; see ante, p. 28.

(*c*) Ante, note (*c*) to p. 21.

(*d*) 1 Kemble, Saxons in England, Bk. I. Ch. XI.;

Const. Hist. § 36, vol. i. pp. 74—78, 2nd ed.

(*e*) Glanvil, lib. 7, 9, 13.

the estate expressly to him *and the heirs of his body* (*f*), ^T making what was then called a *conditional gift*, by ^a reason of the condition implied in the donation, that if ^A the donee died without such particular heirs, or in case of the failure of such heirs at any future time, the land should revert to the donor (*g*). The most usual species of grant appears, however, to have been that to a man *and his heirs* generally; but, as the right of alienation seems to have arisen in the same manner with regard to estates granted in both the above methods, it will be desirable, in considering the origin of this right, to include in our remarks as well an estate granted to a man *and his heirs*, as an estate confined to *the heirs of the body* of the grantee.

In whichever method the estate might have been ^{Tw} granted, it is evident that, besides the tenant, there were two other parties interested in the lands: one, ^{heir and the} the person who was the expectant heir of the tenant, and who had, under the gift, a hope of succeeding his ancestor in the holding of the lands; the other, the lord, who had made the grant, and who had a right to the services reserved during the continuance of the tenancy, and also a possibility of again obtaining the lands on the failure of the heirs mentioned in the gift. An alienation of the lands by the tenant might therefore, it is evident, defeat the rights of one or both of the above parties. Let us, therefore, consider, in the first place, the origin and progress of the right of alienation as it affected the interest of the expectant heir; and, secondly, the origin and progress of this right as it affected the interest of the lord.

The right of an ancestor to defeat the expectation ^{Right of} of his heir was not fully established at the time of ^{alienation as}

(*f*) Bracton, lib. 2, cap. 6, fol. 290 b, n. 11, V. 1.
17 b; cap. 19, fol. 47 a; Co. Litt. 29, 2 Black. Com. 110.

Henry II. For it appears from the treatise of Glanville, written in that reign (*h*), that a larger right of alienation was possessed over lands which a man had acquired by purchase, than over those which had descended to him as the heir of some deceased person: and even over purchased lands the right of alienation was not complete, if the tenant had any heir of his own body (*i*); so that if lands had been given to a man and his heirs generally, he was able to disappoint the expectation of his collateral heirs, but he could not entirely disinherit the heirs sprung of his own body. For certain purposes, however, alienation of part of the lands was allowed to defeat the heirs of his body; thus part of the lands might be given by the tenant with his daughter on her marriage, and part might also be given for religious uses (*j*). Such gifts as these were, however, as we shall presently see, almost the only kinds of alienation, in ancient times, which occasioned any serious detriment to the heir; and the allowing of such gifts may accordingly be considered as an important step in the progress of the right of alienation. For, when lands were given to a daughter on her marriage, the daughter and her husband, or the donees in *frank-marriage*, as they were called, held the lands granted, to them and the heirs of their two bodies *free from all manner of service* to the donor or his heirs (a mere oath of fealty or fidelity excepted), until the fourth degree of consanguinity from the donor was passed (*k*); and when lands were given to religious uses, the grantees in *frankalmoign*, as they were called, were for ever free from every kind of earthly or temporal service (*l*). Little or nothing, therefore, in these cases, remained for the heir of the grantor. But the other modes of

Frank-mar-
riage.

Frankal-
moign.

Other modes
of alienation.

1 Reeves's Hist. Eng. Law,
223.

(i) Ibid. 105.

(j) Glanville, lib. 7, c. 1; 1
s's Hist. 104.

(k) Litt. sects. 17, 19, 20.

(l) Ibid. sect. 135.

alienation which then prevailed were very different in their results, as well from such gifts as above described, as from the ordinary sales of landed property which occur in modern times. Ready money was then extremely scarce; large fortunes, acquired by commercial enterprise, were not then expended in the purchase of country seats. The auction mart was not then established; such a thing as an absolute sale for a sum of money paid down was scarcely to be met with. The alienation of lands rather assumed the form of perpetual leases, granted in consideration of certain services or rents to be from time to time performed or paid. This method was, in feudal language, termed *subinfeudation*. In all the old conveyances, almost without exception, the lands are given to the grantee and his heirs, to hold as tenants of the grantor and his heirs, at certain rents or services (*m*); and when no particular service was reserved, it was understood that the grantee held of the grantor, subject to the same services as the grantor held of his superior lord (*m*). As, therefore, it cannot be supposed that gifts should be made without some fair equivalent, and as such equivalent, in the shape of rent or service, would descend to the heir in lieu of the land, we may fairly presume that alienation, as ordinarily practised in early times, was not so great a disadvantage to the heir as might at first be supposed: and this cir-

All the forms of feoffments in Madox's *Formulare Angl.*, with the exception of Nos. 318 and 325, are in this form. No. 318 is a gift in frank-
 , and was afterwards conveyed by the son of the grantor
 : title, Confirmation. No. 119; and No. 325 appears to have been a family transaction between a father and his son. The curious questions mentioned in Glanville (lib. 7, c. 1) as to the descent of

lands which had been granted by a father to one of his younger or by a brother to his brother, clearly show that of land were then made by subinfeudation. Mr. Reeves's observation (1 Hist. Eng. Law, 106, n. (m)), that the reservation of services was most commonly made to the feoffor, appears to be strong enough.

(n) Perkins's *Profitable* sects. 529, 653.

The power of the ancestor over the ex- of absolute.

cumstance may perhaps help to account for that which at any rate is an undoubted fact, that the power of an ancestor to destroy the expectation of his heirs, whether merely collateral or heirs of his body, soon became absolute. In whichever way the grant were made, whether to the ancestor *and his heirs*, or to him and the *heirs of his body*, we find that by the time of Henry III. the heir was completely in his ancestor's power, so far as related to any lands of which the ancestor had possession. Bracton, who wrote in this reign, expressly lays it down, that the heir acquires nothing from the gift made to his ancestor (o). The very circumstance that land was given to a person and his heirs, or to him and the heirs of his body, enabled him to convey an interest in the land, to last as long as his heirs in the one case, or the heirs of his body in the other, continued to exist. And from the time of Bracton, a gift to a man *and his heirs* generally has enabled the grantee, either entirely to defeat the expectation of his heir by an absolute conveyance, or to prejudice his enjoyment of the descended lands by obliging him to satisfy any debts or demands, to the value of the lands, according to his ancestor's discretion. With respect to lands granted to a man and the *heirs of his body*, the power of the ancestor is not *now* so complete. The means by which this right of alienation was in this case curtailed will appear in the account we shall now give of the origin and progress of the right of alienation as it affected the interest of the lord.

Alienation as affecting the interests of the lord.

The interest of the lord was evidently of two kinds; his interest in the rent and services during the continuance of the tenancy, and his chance or possibility of again obtaining the land on failure of the heirs of

(o) Bracton, lib. 2, cap. 6, fol. 17 a. Nihil acquirit ex donatighe

facta antecessori, quia cum donatorio non est feoffatus.

his tenant. On the former of these interests, the inroad of alienation appears to have been first made. The tenants, by taking upon themselves to make grants of part of their lands to strangers to hold of themselves, prejudiced the security possessed by the lord for the due performance of the services of the original tenure. And accordingly we find it enacted in Magna Charta (*p*), that no freeman should give or sell any more of his land than so as what remained might be sufficient to answer the services he owed to his lord. The original services reserved on any conveyance were, however, always a charge on the land while in the hands of the under-tenants, and could be distrained for by the lord (*q*); although the enforcement of such services was doubtless rendered less easy by the division of the lands into various ownerships. The infringement on the lord's interest, expectant on the failure of the heirs of his tenant, appears to have been the last step in the progress of alienation. As the advantages of a free power of disposition became apparent, a new form of grant came into general use. The lands were given, not only to the tenant and his heirs, but to him and his heirs, or to whomsoever he might wish to give or assign the land (*r*), or with other words expressly conferring on the tenant the power of alienation (*s*). In this case, if the tenant granted, or underlet as it were, part of his land, then, on his decease and failure of his heirs, the tenant's grantee had still a right to continue to hold as tenant of the superior lord; and such superior lord then took the place of landlord, which the original tenant or his heirs would have occupied had he or they been living (*t*). And if the tenant, instead of thus underletting part of his land, chose to

services first
— of —

on the
interest
expectant
failure
heirs.

(*p*) Chap. 32.

(*q*) Perkins's Profitable Book, sect. 674.

(*r*) Bract. lib. 2, c. 6. fol. 17 b.

(*s*) Madox's Formulæ Anglicanæ, Preliminary Dissertation,

p. 5. The tendency towards the alienation of lands was perhaps fostered by the spirit of crusading; see 1 Watkins on Copyholds, pp. 149, 150.

(*t*) Bract. ubi

The fact of the existence of an expectant heir enables the tenant to alienate.

dispose of the whole, he was at liberty so to do, by substituting, if he thought fit, a new tenant in his own place (*u*). Grants of land with liberty of alienation, as they became more frequent, appear in process of time to have furnished the rule by which all grants were construed. During the long and feeble reign of Henry III. this change to the disadvantage of the lord appears to have taken place; for at the beginning of the next reign it seems to have been established that, in whatever form the grant were made, the fact of the existence of an expectant heir enabled the tenant to alienate, not only as against his heirs, but also as against the lord. If therefore lands were given to a man and his heirs, he could at once dispose of them (*x*); and if lands were granted to a man and the heirs of his body, he could at once dispose of them as against the heirs of his body. And he was able, the moment he had issue born—that is, the moment he had an expectant heir of the kind mentioned in the gift—to alienate the lands as against the lord also; and the alienee and his heirs had a right to hold, not only during the existence of the issue, but also after their failure (*y*). The original intention of such gifts was therefore in a great measure defeated; originally, on failure of the issue the lands reverted to the donor; but now nothing was requisite but the mere birth of issue to give the donee a complete power of disposition.

The mere existence of an expectant heir having thus grown up into a reason for alienation, the barons of the

(*u*) See stat. 4 Edw. I. c. 6.

(*x*) Perk. sect. 667—670; Co. Litt. 43 a. If a tenant of a conditional fee had a right of alienation on having issue born, surely a tenant in fee simple must have had at least an equal right. See however Co. Litt. 43 a, n. (2);

Wright's Tenures, 155, note.

(*y*) Fitzherbert's Abr. title Formedon, 62, 65; Britton, 93 b, 94 a; Plowd. Comm. 246; 2 Inst. 333; Co. Litt. 19 a; Year Book, 43 Edw. III. 3 a, pl. 13; *Earl of Stafford v. Buckley*, 2 Vcs. sen. 171.

time of Edward I. began to feel how small was the possibility that the lands, which they had granted by conditional gifts (z) to their tenants and the heirs of their bodies, should ever revert to themselves again; whilst at the same time they perceived the power of their own families weakened by successive alienations. To remedy these evils, and to keep up that feudal system, which landlords ever held in high esteem, but on which the necessities of society ever made silent yet sure encroachments, it was enacted in the reign of Edward I. by the famous statute *De Donis Conditionalibus* (a),—and no doubt as was then thought finally enacted,—that the will of the donor, according to the form in the deed of gift manifestly expressed, should be from thenceforth observed: so that they, to whom the tenement was given, should have no power to alien it, whereby it should fail to remain unto their own issue after their death, or to revert unto the donor or his heirs, if issue should fail. Statute
Donis.

Since the passing of this statute, an estate given to a man and the heirs of his body has been always called an estate tail, or, more properly, an estate in *fee tail* (*feudum tallitum*). The word *fee* (*feudum*) anciently meant any estate feudally held of another person (b); but its meaning is now confined to estates of inheritance,—that is, to estates which may descend to heirs; so that a *fee* may now be said to mean an inheritance (c). The word *tail* is derived from the French word *tailler*, to cut, the inheritance being, by the statute *De J* cut down and confined to the heirs of the body strictly Fee tail.

(z) Ante, p. 59.

Tenures, p. 5.

(a) Stat. 13 Edw. I. c. 1.

(c) Litt. s. 1, Co. Litt. 1 b, 2 a;

the Statute of Westminster the Second.

Wright's Tenures, p. 149.

(b) Bracton, lib. 4, fol. 263 b, par. 6; Selden, Tit. of Honour, part 2, c. 1, s. 23 p. 332

(d) Litt. s. 18; Co. Litt. 18 b, 327 a, n. 2; Wright's Tenures, 187; 2 Black. Com. 112.

but, though an estate tail still bears a name indicative of a restriction of the inheritance from any interruption in its course of perpetual descent from father to son, we shall find that in fact the right to establish such exclusive perpetual descent has long since been abolished.

Inconvenience
of strict en-
tails.

When the statute began to operate, the inconvenience of the strict entails, created under its authority, became sensibly felt: children, it is said, grew disobedient when they knew they could not be set aside; farmers were deprived of their leases; creditors were defrauded of their debts; and innumerable latent entails were produced to deprive purchasers of the land they had fairly bought; treasons also were encouraged, as estates tail were not liable to forfeiture longer than for the tenant's life (*e*). The nobility, however, would not consent to a repeal, which was many times attempted by the commons (*f*), and for about two hundred years the statute remained in force. At length the power of alienation was once more introduced, by means of a quiet decision of the judges, in a case which occurred in the twelfth year of the reign of King Edward IV. (*g*). In this case, called *Taltarum's case*, the destruction of an entail was accomplished by judicial proceedings collusively taken against a tenant in tail for the recovery of the lands entailed. Such proceedings were not at that period quite unknown to the English law, for the monks had previously hit upon a similar device, for the purpose of evading the Statutes of Mortmain, by which open conveyances of lands to their religious houses had been prohibited; and this device they had practised with considerable success till restrained by Act of Parliament (*h*). In the case of which we are now speaking, the law would not allow the entail to be destroyed

u's
, entails
d.

(*e*) 2 Black. Com. 116.

(*f*) Cruise on Recoveries.

(*g*) *Taltarum's case*, Year Book,

12 Edw. IV. 19.

(*h*) Statute of Westminster the Second, 13 Edw. I. c. 32; 2 Black. Com. 271.

simply by the recovery of the lands entailed, by a friendly plaintiff on a fictitious title; this would have been too barefaced; and in such a case the issue of the tenant, claiming under the gift to him in tail, might have recovered the lands by means of a writ of *formedon* (i), so called because they claimed *per formam doni*, Formedon. according to the form of the gift, which the statute had declared should be observed. The alienation of the lands entailed was effected in a more circuitous mode, by judicial sanction being given to the following proceedings, which afterwards came into frequent and open use, and had some little show of justice to the issue, though without any of its reality. The tenant in tail, A recovery. on the collusive action being brought, was allowed to bring into Court some third person, presumed to have been the original grantor of the estate tail. The tenant then alleged that this third person had *warranted* the title; and accordingly begged that he might defend the Warranty. title which he had so warranted. This third person was accordingly called on; who, in fact, had had nothing to do with the matter; but, being a party in the scheme, he admitted the alleged warranty, and then allowed judgment to go against him by default. Whereupon judgment was given for the demandant or plaintiff, to recover the lands from the tenant in tail; and the tenant in tail had judgment empowering him to recover a recompence in lands of *equal value* from the defaulter, who had thus cruelly failed in defending his title (k). If any such lands *had* been recovered under the judgment, they would have been held by the tenant for an estate tail, and would have descended to the issue, in lieu of those which were lost by the warrantor's default (l). But the defaulter, on whom the burden was thus cast, was a man who had no lands to give, some man of straw, who could easily be prevailed on to under-

(i) Litt. ss. 688, 690.

Com. 358.

(k) Co. Litt. 361 b. 2 Black.

4/ 2 Black. Com. 360.

take the responsibility ; and, in later times, the crier of the Court was usually employed. So that, whilst the issue had still the judgment of the Court in their favour, unfortunately for them it was against the wrong person ; and virtually their right was defeated, and the estate
 il barred. tail was said to be *barred*. Not only were the issue barred of their right, but the donor, who had made the grant, and to whom the lands were to revert on failure
 The reversion barred. of issue, had his reversion barred at the same time (*m*). So also all estates which the donor might have given to other persons, expectant on the decease of the tenant in tail without issue, (and which estates are called *remainders* expectant on the estate tail,) were equally
 And re- barred. *remainders*. The demandant, in whose favour judgment was given, became possessed of an estate in fee simple in the lands ; an estate the largest allowed by law, and bringing with it the fullest powers of alienation, as will be hereafter explained : and the demandant, being a friend of the tenant in tail, of course disposed of the estate in fee simple according to his wishes.

Such a piece of solemn juggling could not long have held its ground, had it not been supported by its substantial benefit to the community ; but, as it was, the progress of events tended only to make that certain which at first was questionable ; and proceedings on the principle of those above related, under the name of suffering *common recoveries*, maintained their ground and long continued in common use as the undoubted privilege of every tenant in tail. The right to suffer a common recovery was considered as the inseparable incident of an estate tail, and every attempt to restrain this right was held void (*n*). Complex, however, as

Common recoveries.

(*m*) 2 Black. Com. 360; Cruise on Recoveries, 258.

(*n*) *Mary Portington's case*, 10 Rep. 36; Co. Litt. 224 a; Fearne

on Contingent Remainders, 260 ; 2 Black. Com. 116 : *Darwins v. Lord Penrhyn*, 6 Ch. D. 318 ; 4 App. Cas. 51.

OF AN ESTATE TAIL.

the proceedings above related may appear, the ordinary forms of a *common recovery* in later times were more complicated still. The lands were in the first place conveyed, by a deed called the recovery deed, to a person against whom the action was to be brought, and who was called the tenant to the *præcipe* or writ (6). The proceedings then took place in the Court of Common Pleas, which had an exclusive jurisdiction in all real actions. A regular writ was issued against the tenant to the *præcipe* by another person, called the *demandant*; the tenant in tail was then required by the tenant to the *præcipe* to warrant his title according to a supposed engagement for that purpose; this was called vouching the tenant in tail to warranty. The tenant in tail, on being vouched, then vouched to warranty in the same way the crier of the Court, who was called the common vouchee. The *demandant* then craved leave to imparl or confer with the last vouchee in private, which was granted by the Court; and the vouchee, having thus got out of Court, did not return; in consequence of which, judgment was given in the manner before mentioned, on which a regular writ was directed to the sheriff to put the *demandant* into possession (7). The proceedings, as may be supposed, necessarily passed through numerous hands, so that mistakes were not unfrequently made, and great expense was always incurred (8). To remedy this evil, an Act of Parliament (9) was accordingly passed in the

By stat. 14 II. c. 20,
commonly Mr. Pigott's Act,
it was

to the to the practice ap-
executed before the
end of the term in which the re-
covery was suffered; 1 Prest. Con.
61 et seq.; *Goodright* d.
v. Rigby, 6 T. Rep. 177.

being in form judicial pro-
could only be suffered

p Cruise on Recovery, ch. 1, 12.

of Real Pro-
p. 25.

"An act for the abolition of fines and recoveries and for the substitution of more simple modes of assurance." Stat. 3 & 4 Will. IV. c. 74, drawn by Mr. Brodie ;
in Conveyancing,

Recoveries
abolished.

year 1833, on the recommendation of the commissioners on the law of real property. This Act, which in the wisdom of its design, and the skill of its execution, is quite a model of legislative reform, abolished the whole of the cumbrous and suspicious-looking machinery of common recoveries. It has substituted in their place a simple deed, executed by the tenant in tail and in-rolled, formerly in the Court of Chancery, and now in the Enrolment Department of the Central Office of the Supreme Court of Judicature (*s*): by such a deed, a tenant in tail in possession is now enabled to dispose of the lands entailed for an estate in fee simple; thus at once defeating the claims of his issue, and of all persons having any estates in remainder or reversion.

A fine.

A common recovery was not, in later times, the only way in which an estate tail might be barred. There was another assurance as effectual in defeating the claim of the issue, though it was inoperative as to the remainders and reversion. This assurance was a fine. Fines were in *themselves*, though not in their operation on estates tail, of far higher antiquity than common recoveries (*t*). They were not, like recoveries, actions at law carried out through every stage of the process; but were fictitious actions, commenced and then compromised by leave of the Court, whereby the lands in question were acknowledged to be the right of one of the parties (*u*). They were called *fines* from their having anciently put an *end*, as well to the pretended suit, as to all claims not made within a year and a day afterwards (*x*), a summary method of ending all disputes, grounded on the solemnity and publicity of the

(*s*) The enrolment must be within six calendar months after the execution; sect. 41. See sect. 74; stats. 36 & 37 Vict. c. 66, ss. 16, 77; 42 & 43 Vict. c. 78; Rules of the Supreme Court. 1883. Ord.

LXI. r. 9.

(*c*) Cruise on Fines, ch. 1.

(*u*) 2 Black. Com. 348.

(*x*) Stat. 18 Edw. I. stat. 4; 2 Black. Com. 349, 354; Co. Litt. 121 a, n. (1).

proceedings as taking place in open Court. This power of barring future claims was taken from fines in the reign of Edward III. (y) ; but it was again restored, with an extension however of the time of claim to five years, by statutes of Richard III. (z) and Henry VII. (a) ; by which statutes also provision was made for the open proclamation of all fines several times in Court, during which proclamation all pleas were to cease; and in order that a fine might operate as a bar after non-claim for five years, it was necessary that it should be *levied*, as it was said, with proclamations. But, now, by a statute of the present reign (b), all fines heretofore levied in the Court of Common Pleas shall be conclusively deemed to have been levied with proclamations, and shall have the force and effect of fines with proclamations. A judicial construction of the statute of Henry VII. (c), quite apart, as it should seem, from its real intention (d), gave to a fine by a tenant in tail the force of a bar to his issue after non-claim by them for five years after the fine; and this construction was confirmed by a statute of the reign of Henry VIII., which made the bar immediate (e). Since this time the effect of fines in barring an entail, so far as the issue were concerned, remained unquestioned till their abolition; which took place at the same time, and by the same Act of Parliament (f), as the abolition of common recoveries. A

Proclama-
tions.

(y) Stat. 31 Edw. III. c. 16, a curious specimen of the conciseness of ancient acts of parliament. This is the whole of it: "Also it

1, that the plea of non-
of fines, which from hence-
forth shall be levied, shall not be
taken or holden for any bar in
time to come."

(z) 1 Rich. III. c. 7.

(a) 4 Hen. VII. c. 24; see also
stat. 31 Eliz. c. 2.

(b) Stat. 11 & 12 Vict. c. 70:

c, Bro. Abr. tit. Fine, pl. 1;
Dyer, 3a; Cruise on Fines, 173.

d 4 Reeves's Hist. Eng. Law,
135, 138, 1 Hallam's Const. Hist.
14, 17. The deep designs attri-
buted by Blackstone 2 Black.
Comm. 118, 354, and some others
to Henry VII. in procuring the
passing of this statute, are shown
by the above writers to have most
probably had no existence.

(e) 32 Hen. VIII. c. 36.

(f) 3 & 4 Will. IV. c. 74.

deed inrolled in the Central Office of the Supreme Court (*g*) is now substituted, as well for a fine, as for a common recovery.

Settlements.

Although strict and continuous entails have long been virtually abolished, their remembrance seems still to linger in many country places, where the notion of *heir land*, that must perpetually descend from father to son, is still to be met with. It is needless to say that such a notion is quite incorrect. In families where the estates are kept up from one generation to another, settlements are made every few years for this purpose; thus in the event of a marriage, a life estate merely is given to the husband (*h*); the wife has an allowance for pin-money during the marriage, and a rent-charge or annuity by way of jointure for her life, in case she should survive her husband. Subject to this jointure, and to the payment of such sums as may be agreed on for the portions of the daughters and younger sons of the marriage, *the eldest son who may be born of the marriage is made by the settlement tenant in tail*. In case of his decease without issue, it is provided that the second son, and then the third, should in like manner be tenant in tail: and so on to the others; and in default of sons, the estate is usually given to the daughters. By this means the estate is tied up till some tenant in tail attains the age of twenty-one years; when he is able, with the consent of the father, who is tenant for life, to bar the entail with all the remainders. Dominion is thus again acquired over the property, which dominion is usually exercised in a re-settlement on the next generation; and thus the property is preserved in the family. Primogeniture, therefore, as it obtains among the landed gentry of England, is a

Primogeni-
ture.

(*g*) Stats. 36 & 37 Vict. c. 66,
ss. 16, 77; 42 & 43 Vict. c. 78;
Rules of the Supreme Court,

Ord. LXI. r. 9.

(*h*) See *ante*, p. 21, n. (*c*);
and p. 24, n. (*c*).

only, and not a *right*; though there can be no doubt that the custom has originated in the right, which was enjoyed by the eldest son, as heir to his father, in those days when estates tail could not be barred. Primogeniture, as a custom, has been the subject of much remark *(i)*. Where family honours or family estates are to be preserved, some such device appears necessary. But, in other cases, strict settlements of the kind referred to seem fitted rather to maintain the posthumous pride of present owners, than the welfare of future generations. The policy of the law is now in favour of the free disposition of all kinds of property; and as it allows estates tail to be barred, so it will not permit the object of an entail to be accomplished by other means, any further than can be done by giving estates to the unborn children of *living persons*. Thus an estate given to the children of an *unborn child* would be absolutely void *(j)*. The desire of individuals to keep up A their name and memory has often been opposed to this rule of law, and many shifts and devices have from time to time been tried to keep up a perpetual entail, or something that might answer the same end *(k)*. But such contrivances have invariably been defeated; and no plan can be now adopted by which lands can with certainty be tied up, or fixed as to their future destination, for a longer period than the lives of existing persons and a term of twenty-one years after their decease *(l)*.

(i), See 2 Adam Smith's *Wealth of Nations*, 181, M'Culloch's *Principles of Political Economy*, 2d ed. vol. 4, p. 441. See also *Traité de Législation Civile et Pénale*, ouvrage extrait des Manuscrits de Bentham, par Dumont, tom. 1, p. 307.

(j) *Hay v. Earl of Coventry*, 3 T. Rep. 86; *Brudenell v. Elwes*,

10 Ves. 253 et

Searing v. Baxter, 5 Ves. 458.

(k), Fearn's *Contingent Remainders*, 430 et seq. The period of gestation is also included, if gestation exist; *Cadell v. Palmer*, 7 Bligh, N. S. 202.

OF CORPOREAL HEREDITAMENTS.

When the estate tail is preceded by a life interest.

The concurrence of the first tenant for life required.

Protector.

His consent required to bar remainders and reversions.

Whenever an estate tail is not an estate in possession, but is preceded by a life interest to be enjoyed by some other person prior to the possession of the lands by the tenant in tail, the power of such tenant in tail to acquire an estate in fee simple in remainder expectant on the decease of the tenant for life is subject to some limitation. In the time when an estate tail, together with the reversion, could only be barred by a recovery, it was absolutely necessary that the first tenant for life, who had the possession of the lands, should concur in the proceedings; for no recovery could be suffered, unless on a feigned action brought against the feudal holder of the possession (*m*). This technical rule of law was also a valuable check on the tenant in tail under every ordinary settlement of landed property; for, when the eldest son (who, as we have seen, is usually made tenant in tail) came of age, he found that, before he could acquire the dominion expectant on the decease of his father, the tenant for life, he must obtain from his father consent for the purpose. Opportunity was thus given for providing that no ill use should be made of the property (*n*). When recoveries were abolished, the consent formerly required was accordingly still preserved, with some little modification. The Act abolishing recoveries has established the office of *protector*, which almost always exists during the continuance of such estates under the settlement as may precede an estate tail. And the consent of the protector is required to be given, either by the same deed by which the entail is barred, or by a separate deed, to be executed on or before the day of the execution of the former, and to be also inrolled in the Central Office of the Supreme Court at or previously to

(*m*) Cruise on Recoveries, 21.
See however stat. 14 Geo. II.
c. 20.

(*n*) See First Report of
Property Commissioners, p. 32

OF AN ESTATE TAIL.

the time of the inrolment of the deed which bars the entail (*o*). Without such consent the remainders and reversion cannot be barred (*p*). In ordinary cases the protector is the first tenant for life under the settlement, in analogy to the old law (*q*); but a power is given by the Act, to any person entailing lands, to appoint, in the place of the tenant for life, any number of persons, not exceeding three, to be together protector of the settlement during the continuance of the preceding estates (*r*); and, in such a case, the consent of such persons only need be obtained in order to effect a complete bar to the estate tail, and the remainders and reversion. The protector is under no restraint in giving or withholding his consent, but is left entirely to his own discretion (*s*). If he should refuse to consent, the tenant in tail may still bar his own issue; as he might have done before the Act by levying a fine; but he cannot bar estates in remainder or reversion. The consequence of such a limited bar is, that the tenant acquires a disposable estate in the land for so long as he has any issue or descendants living, and no longer; that is, so long as the estate tail would have lasted had no bar been placed on it. This is called a base fee. But, when his issue fail, the persons having estates in remainder or reversion become entitled. When the estate tail is in possession, that is, when there is no previous estate for life or otherwise, there can very seldom be any protector (*t*), and the tenant in tail may, at any time by deed duly inrolled, bar the entail, remainders and reversion at his own pleasure. And where a previous estate for life exists, it does not confer the office of pro-

The issue
by
a
protector's con-
sent.

Base fee.

Estate tail in

Life estate

(*o*) Stats. 3 & 4 Will. IV. c. 74,
ss. 42—47; 36 & 37 Vict. c. 66,
ss. 16, 77; 42 & 43 Vict. c. 78;
Rules of the Supreme Court, 1883,
Ord. LXI. r. 9.

(*p*) Sects. 34, 35.

(*q*) Sect. 22.

(*r*) Sect. 32.

(*s*) Sects. 36, 37.

(*t*) See Sugd. Vend. & Pur.
593, 11th ed.

feudor, unless it be created by the same settlement which created the estate tail; so that a tenant in tail in remainder expectant on an estate for life, created by some prior deed or will, may bar the entail, remainders and reversion, without the consent of the tenant for life under such prior deed or will (*u*).

Estates tail
granted by
the crown as
the reward of
military ser-

The above-mentioned right of a tenant in tail to bar the entail is subject to a few exceptions; which, though of not very frequent occurrence, it may be as well to mention. And, first, estates tail granted by the crown as the reward for public services cannot be barred so long as the reversion continues in the crown. This restriction was imposed by an Act of Parliament of the reign of Henry VIII. (*v*), and it has been continued by the Act by which fines and recoveries were abolished (*x*). There are also some cases in which entails have been created by particular Acts of Parliament, and cannot be barred.

Tenant in tail
after possi-
bility of issue
extinct.

Again, an estate tail cannot be barred by any person who is *tenant in tail after possibility of issue extinct*. This can only happen where a person is tenant in *special* tail. For instance, if an estate be given to a man and the heirs of his body by his present wife; in this case, if the wife should die without issue, he would become tenant in tail after possibility of issue extinct (*y*); the possibility of his having issue who could inherit the estate tail would have become extinct on the death of his wife. A tenancy of this kind can never arise in an ordinary estate in tail general or tail male;

(*u*) *Berrington v. Scott*, Exch. 18th January, 1875; 32 L. T., N. S. 125.

(*v*) Stat. 34 & 35 Hen. VIII. c. 20; Cruise on Recoveries, 318.

(*x*) Stat. 3 & 4 Will. IV. c. 74, s. 18; *Duke of Grafton's case*, 6 New Cases, 27.

(*y*) Litt. sects. 32, 33; 2 Black. Com. 124.

for, so long as a person lives, the law considers that the possibility of issue continues, however improbable it may be from the great age of the party (z). Tenants in tail after possibility of issue extinct were prohibited from suffering common recoveries by a statute of the reign of Elizabeth (a), and a similar prohibition is contained in the Act for the Abolition of Fines and Recoveries (b). But, as we have before remarked (c), tenancies in special tail are not now common. In modern times, when it is intended to make a provision for the children of a particular marriage, estates are given directly to the unborn children, which take effect as they come into existence: whereas in ancient times, as we shall hereafter see (d), it was not lawful to give any estate directly to an unborn child.

The last exception is one that can only arise in the case of grants and settlements made before the passing of the Act for the Abolition of Fines and Recoveries; for the future it has been abolished. It relates to women who are tenants in tail of lands of their husbands, or lands given by any of his ancestors. After the decease of the husband, a woman so tenant in tail *ex parte* *provisione viri* was prohibited by an old statute (e) from suffering a recovery without the assent, recorded or inrolled, of the heirs next inheritable to her, or of him or them that next after her death should have an estate of inheritance, (that is, in tail or in fee simple,) in the lands: she was also prohibited from levying a fine under the same circumstances by the statute which confirmed to fines their force in other cases (f). This

Tenant in tail
ex parte
provisione

(z) Litt. sect. 34; Co. Litt. 40 a; 2 Black. Com. 125; *Jee v. Audley*, 1 Cox, 324.

(a) 14 Eliz. c. 8.

(b) 3 & 4 Will. IV. c. 74, s. 18.

(c) Ante, p. 57.

(d) See the Chapter on a Contingent Remainder.

(e) 11 Hen. VII. c. 20.

(f) Stat. 32 Hen. VIII. c. 36 s. 2.

kind of tenancy in tail very rarely occurs in modern practice, having been superseded by the settlements now usually made on the unborn children of the marriage.

An estate tail cannot be barred by will or contract.

It is important to observe that an estate tail can only be barred by an actual conveyance by deed, duly enrolled according to the Act of Parliament by which a deed was substituted for a common recovery or fine (*h*). Thus every attempt by a tenant in tail to leave the lands entailed by his will (*i*), and every contract to sell them, not completed in his lifetime by the proper bar (*j*), will be null and void as against his issue claiming under the entail, or as against the remaindermen or reversioners, (that is, the owners of estates in remainder or reversion,) should there be no such issue left.

Timber.

Leases.

A tenant in tail may cut down timber for his own benefit, and commit what waste he pleases, without the necessity of barring the entail for that purpose (*k*). A tenant in tail was moreover empowered by a statute of Henry VIII. (*l*) to make leases, under certain restrictions, of such of the lands entailed as had been most commonly let to farm for twenty years before; but such leases were not to exceed twenty-one years, or three lives, from the day of the making thereof, and the accustomed yearly rent was to be reserved. This power was however of little use; for leases under this statute, though binding on the issue, were not binding on the remainderman or reversioner (*m*), and consequently had not that certainty of enjoyment which is

(*h*) *Peacock v. Eastland*, M. R., L. R., 10 Eq. 17.

(*i*) Cro. Eliz. 805; Co. Litt. 111 a; stat. 3 & 4 Will. IV. c. 74, s. 40.

(*j*) Bac. Abr. tit. Estate in Tail (D); stat. 3 & 4 Will. IV. c. 74, s. 40.

Co. Litt. 224 a; 2 Black. Com. 115.

(*l*) Stat. 32 Hen. VIII. c. 28; Co. Litt. 44 a; Bac. Abr. tit. Leases and Terms for Years (D) 2.

(*m*) Co. Litt. 45 b; 2 Black. Com. 319.

the great inducement to the outlay of capital, and the consequent improvement of landed property; and this statute has been recently repealed (*n*). The Act for Present the Abolition of Fines and Recoveries now empowers { every tenant in tail in possession to make leases by deed, without the necessity of inrolment, for any term not exceeding twenty-one years, to commence from the date of the lease, or from any time not exceeding twelve calendar months from the date of the lease, where a rent shall be thereby reserved, which, at the time of granting such lease, shall be a rack-rent, or not less than five-sixth parts of a rack-rent (*o*). And under the Settled Estates Act, 1877 (*p*), a tenant in tail in possession has the same power of leasing as is thereby given to a tenant for life (*q*). The Settled Land Act, 1882 (*r*), now gives the powers of a tenant for life under that Act (*s*), to each of the following persons, when the estate or interest of each of them is in possession:—

(a) A tenant in tail, including a tenant in tail who is by Act of Parliament restrained from barring or defeating his estate tail, and although the reversion is in the crown (*t*), and so that the exercise by him of his powers under this Act shall bind the crown, but not including such a tenant in tail where the land in respect whereof he is so restrained was purchased with money provided by Parliament in consideration of public services;

(b) A person entitled to a base fee (*u*), although the reversion is in the crown, and so that the exercise by him of his powers under this Act shall bind the crown;

(*n*) Stat. 19 & 20 Vict. c. 120, s. 35. s. 58, subs. 1 (i), (iii), (vii); Williams's Conveyancing Statutes, 361—364.

(*o*) Stat. 3 & 4 Will. IV. c. 74, ss. 15, 40, 41. (*s*) See ante, pp. 35—38, 43—46, 49—54.

(*p*) Stat. 40 & 41 Vict. c. 18, s. 46. (*t*) See ante, p. 76.

(*q*) See ante, p. 34. (*u*) Ante, p. 75.

(*r*) Stat. 45 & 46 Vict. c. 38,

(c) A tenant in tail after possibility of issue extinct (*x*).

Sale and exchange.

At the present time therefore every tenant in tail in possession (with the exception above specified) may grant all such leases as a tenant for life may grant under the Settled Land Act, 1882 (*y*), and also may sell or exchange his land under that Act (*z*), without the necessity of barring the entail. But in such cases the proceeds of a sale, and any capital money arising upon the grant of a lease (*a*), and any land taken in exchange, will become subject to the entail.

Forfeiture for treason.

It has been observed that, in ancient times, estates tail were not subject to forfeiture for high treason beyond the life of the tenant in tail (*b*). This privilege they were deprived of by an Act of Parliament passed in the reign of Henry VIII. (*c*), by which all estates of inheritance (under which general words estates tail were covertly included) were declared to be forfeited to the king upon any conviction of high treason (*d*). But the Act "to abolish forfeitures for treason and felony and to otherwise amend the law relating thereto" (*e*) now provides (*f*), that after the passing of that Act, which took place on the 4th July, 1870, no confession, verdict, inquest, conviction or judgment of or for any treason or felony or *felo de se* shall cause any attainder or corruption of blood or any forfeiture or escheat. The attainder of the ancestor did not of itself prevent the descent of an estate tail to his issue, as they claimed from the original donor, *per formam doni* (*g*); and, therefore, on attainder for murder, an estate tail still descended to

New enactment.

Attainder.

(*x*) Ante, p. 76.

(*y*) See ante, pp. 35—38.

(*z*) See ante, pp. 49—54.

(*a*) See ante, p. 37.

(*b*) Ante, p. 66.

(*c*) 26 Hen. VIII. c. 13, s. 5;

see also 5 & 6 Edw. VI. c. 11, s. 9.

(*d*) 2 Black. Com. 118.

(*e*) Stat. 33 & 34 Vict. c. 23.

(*f*) Sect. 1.

(*g*) 3 Rep. 10; 8 Rep. 165 b;

Cro. Eliz. 28.

the issue. By virtue of another statute of the reign of Henry VIII. (*h*), estates tail are charged, in the hands of the heir, with debts due from his ancestor to the crown, by judgment, recognizance, obligation, or other specialty, although the *heir* shall not be comprised therein. And all arrears and debts due to the crown, by accountants to the crown, whose yearly or total receipts exceed three hundred pounds, were, by a later statute of the reign of Elizabeth (*i*), placed on the same footing. But estates tail, if suffered to descend, were not subject to the debts of the deceased tenant owing to private individuals (*k*). By an Act passed at the commencement of Her present Majesty's reign debts, for the payment of which any judgment, decree, order or rule had been given or made by any court of law or equity, were made binding on the lands of the debtor, as against the issue of his body, and also as against all other persons whom he might, without the assent of any other person, cut off and debar from any remainder or reversion (*l*). But a more recent statute has enacted that no such judgment, decree, order or rule to be entered up after the 29th of July, 1864, the date of the Act, shall affect any land until such land shall have been actually delivered in execution (*m*). An estate tail may also be barred and disposed of on the bankruptcy of a tenant in tail, for the benefit of his creditors, to the same extent as he might have barred or disposed of it for his own benefit (*n*). Debts to the crown.
Judgment debts.
Bankruptcy.

In addition to the liabilities above mentioned are the rights which the marriage of a tenant in tail confers on Husband and wife.

(*h*) Stat. 33 Hen. VIII. c. 39, s. 75.

(*i*) Stat. 13 Eliz. c. 4; and see 14 Eliz. c. 7; 25 Geo. III. c. 35.

(*k*) Com. Dig. Estates (B) 22.

(*l*) Stat. 1 & 2 Vict. c. 110, ss. 13, 18.

(*m*) Stat. 27 & 28 Vict. c. 112, ss. 1, 2.

(*n*) Stats. 3 & 4 Will. IV. c. 74, ss. 56—73; 46 & 47 Vict. c. 52, s. 56, subss. 5; see Williams on Personal Property, 224, 225, 232—234, 240, 12th ed.

Descent of an
estate tail.

the wife, if the tenant be a man, or on the husband, if the tenant be a woman ; an account of which will be contained in a future chapter on the relation of husband and wife. But, subject to these rights and liabilities, an estate tail, if not duly barred, will descend to the issue of the donee in due course of law ; all of whom will be necessarily tenants in tail, and will enjoy the same powers of disposition as their ancestor, the original donee in tail. The course of descent of an estate tail is similar, so far as it goes, to that of an estate in fee simple, an explanation of which the reader will find in the fourth chapter.

Quasi entail.

If an estate *pur autre vie* should be given to a person and the heirs of his body, a *quasi entail*, as it is called, will be created, and the estate will descend, during its continuance, in the same manner as an ordinary estate tail. But the owner of such an estate in possession may bar his issue, and all remainders, by an ordinary deed of conveyance (*o*), without any inrolment under the statute for the abolition of fines and recoveries. If the estate tail be in remainder expectant on an estate for life, the concurrence of the tenant for life is necessary to enable the tenant in tail to defeat the subsequent remainders (*p*).

(*o*) Fearn, Cont. Rem. 495 et War. 307, 324, 332 ; *Edwards v. Allen v. Allen*, 2 Dru. & *Champion*, 3 De Gex, M. & G. 202.

CHAPTER III.

OF AN ESTATE IN FEE SIMPLE.

AN estate in fee simple (*feudum simplex*) is the greatest estate or interest which the law of England allows any person to possess in landed property (*a*). A tenant in fee simple is he that holds lands or tenements to him Tenant in fee and his heirs (*b*); so that the estate is descendible, not merely to the heirs of his body, but to collateral relations, according to the rules and canons of descent. An estate in fee simple is of course an estate of free- and has an hold, being a larger estate than either an estate for life, estate of free- or in tail (*c*). hold.

It is not, however, the mere descent of an estate in fee simple to collateral heirs, that has given to this estate its present value and importance: the unfettered right of alienation, which is now inseparably incident to this estate, is by far its most valuable quality. This right has been of gradual growth: for, as we have seen (*d*), estates were at first inalienable by tenants, without their lord's consent; and the heir did not derive his title so much from his ancestor as from the lord, who, when he gave to the ancestor, gave also to his heirs. In process of time, however, the ancestor acquired, as we have already seen (*c*), the right, first, of disappointing the expectations of his heir, and then of defeating the interests of his lord. The alienations, Right of alienation.

(*a*) Litt. s. 11.(*b*) Litt. s. 1.(*c*) Litt. s. 57; ante, pp. 26, 58.(*d*) Ante, pp. 23, 24.(*e*) Ante, pp. 59—64.

Part of any lands could not anciently be granted to hold of the superior lord.

* Subinfeudation disadvantageous to the superior lords.

by which these results were effected were, as will be remembered, either the subinfeudation of parts of the land, to be holden of the grantor, or the conveyance of the whole, to be holden of the superior lord. It was impossible to make a grant of part of the lands to be holden of the superior lord without his consent; for the services reserved on any grant were considered as entire and indivisible in their nature (*f*). The tenant, consequently, if he wished to dispose of part of his lands, was obliged to create a tenure between his grantee and himself, by reserving to himself and his heirs such services as would remunerate him for the services, which he himself was liable to render to his superior lord. In this manner the tenant became a lord in his turn; and the method which the tenants were thus obliged to adopt, when alienating part of their lands, was usually resorted to by choice, whenever they had occasion to part with the whole; for the *immediate* lord of the holder of any lands had advantages of a feudal nature (*g*), which did not belong to the superior lord when any mesne lordship intervened; it was therefore desirable for every feudal lord, that the *possession* of the lands should always be holden by his own immediate tenants. The barons at the time of Edward I. accordingly, perceiving that, by the continual subinfeudations of their tenants, their privileges as superior lords were gradually encroached on, proceeded to procure an enactment in their own favour with respect to estates in fee simple, as they had then already done with regard to estates tail (*h*). They did not, however, in this case, attempt to restrain the practice of alienation altogether, but simply procured a prohibition of the practice of subinfeudation; and at

(*f*) Co. Litt. 43 a.

par. 2.

(*g*) Such as marriage and wardship, to be hereafter explained. See Bract. lib. ii. c. 19.

(*h*) By the stat. *De Donis*, 13 Edw. I. c. 1, ante, p. 65.

the same time obtained, for their tenants, facility of alienation of parts of their lands, to be holden of the chief lords.

The statute by which these objects were effected is known by the name of the statute of *Quia emptores* (i); so called from the words with which it commences. It enacts that from thenceforth it shall be lawful to every freeman, to sell at his own pleasure his lands and tenements or part thereof, so nevertheless that the feoffee (or purchaser) shall hold the same lands or tenements of the same chief lord of the fee, and by the same services and customs, as his feoffor held them before. And it further enacts (k), that, if he sell any part of such his lands or tenements to any person, the feoffee shall hold that part immediately of the chief lord, and shall be forthwith charged with so much service as pertaineth, or ought to pertain, to the said chief lord, for such part, according to the quantity of the land or tenement so sold. This statute did not extend to those who held of the king as tenants *in capite*, who were kept in restraint for some time longer (l). Free liberty of alienation was however subsequently acquired by them; and the right of disposing of an estate in fee simple, by act *inter vivos*, is now the undisputed privilege of every tenant of such an estate (m).

The statute of
Quia emptores.

The alienation of lands by will was not allowed in this country, from the time the feudal system became completely rooted, until many years after alienation *inter vivos* had been sanctioned by the statute of *Quia emptores*. The city of London, and a few other favoured places, formed exceptions to the general restraint on the power of testamentary alienation of

Alienation by
will.

(i) Stat. 18 Edw. I. c. 1.

(k) Chap. 2.

(l) Wright's Tenures, 162.

(m) Wright's Tenures, 172;
Co. Litt. 111 b, n. (1).

estates in fee simple (*n*) ; for in these places tenements might be devised by will, in virtue of a special custom. In process of time, however, a method of devising lands by will was covertly adopted by means of conveyances to other parties, *to such uses* as the person conveying should appoint by his will (*o*). This indirect mode of devising lands was intentionally restrained by the operation of a statute, passed in the reign of King Henry VIII. (*p*), known by the name of the Statute of Uses, to which we shall hereafter have occasion to make frequent reference. But only five years after the passing of this statute, lands were by a further statute expressly rendered devisable by will. This great change in the law was effected by statutes of the 32nd and 34th of Henry VIII. (*q*). But even by these statutes the right to devise was partial only, as to lands of the then prevailing tenure ; and it was not till the restoration of King Charles II., when the feudal tenures were abolished (*r*), that the right of devising freehold lands by will became complete and universal. At the present day, every tenant in fee simple so fully enjoys the right of alienating the lands he holds, either in his lifetime or by his will, that most tenants in fee think themselves to be the lords of their own domains ; whereas, in fact, all landowners are merely tenants in the eye of the law, as will hereafter more clearly appear.

Blackstone's explanation of an estate in fee simple is that a tenant in fee simple holds to him and his heirs for ever, generally, absolutely and simply, without mentioning *what* heirs, but referring that to his own pleasure, or the disposition of the law (*s*). But the idea

(*n*) Litt. sect. 167 ; Perk. sects. 528, 537.

(*o*) Perk. ubi sup.

(*p*) Stat. 27 Hen. VIII. c. 10, intituled "An Act concerning Uses and Wills."

(*q*) Stat. 32 Hen. VIII. c. 1 ; 34 & 35 Hen. VIII. c. 5 ; Co. Litt. 111 b, n. (1).

(*r*) By stat. 12 Car. II. c. 24.

(*s*) 2 Black. Com. 104. See however 3 Black. Com. 224,

of nominating an heir to succeed to the inheritance has no place in the English law, however it might have obtained in the Roman Jurisprudence. The heir is always appointed by the law, the maxim being *Solus Deus heredem facere potest, non homo* (t); and all other persons, whom a tenant in fee simple may please to appoint as his successors, are not his heirs but his assigns. Thus, a purchaser from him in his lifetime, and a devisee under his will, are alike assigns in law, claiming in opposition to, and in exclusion of, the heir who would otherwise have become entitled (u). The heir is appointed by law.

With respect to certain persons, exceptions occur to the right of alienation. Before the Naturalization Act, 1870 (v), if an alien or foreigner, under no allegiance to the crown (x), purchased an estate in lands, the crown might at any time have asserted a right to such estate; unless it were merely a lease taken by a subject of a friendly state for the residence or occupation of himself or his servants, or the purpose of any business, trade, or manufacture, for a term not exceeding twenty-one years (y). For the conveyance to an alien of any greater estate in lands in this country, was a cause of forfeiture to the Queen, who, after an inquest of office had been held for the purpose of finding the truth of the facts, might have seized the lands accordingly (z). Before office found, that is, before the verdict of any such inquest of office had been given, an alien might have made a conveyance to a natural-born subject; and such conveyance would have been valid for all purposes (a), except to defeat the prior right of the crown, Excepted persons.

where the correct account is given.

(t) 1 Reeves's Hist. Eng. Law, 105; Co. Litt. 191 a, n. (1), vi. 3.

(u) *Hogan v. Jackson*, Cowp. 305; Co. Litt. 191 a, n. (1), vi. 10.

(v) Stat. 33 Vict. c. 14.

(x) Litt. s. 198.

(y) Stat. 7 & 8 Vict. c. 66, s. 5.

(z) Co. Litt. 2 b, 42 b; 1 Black. Com. 371, 372; 2 Black. Com. 249, 274, 293.

(a) Shep. Touch. 232; 4 Leo.

84

which would have still continued. No person is considered an alien who is born within the dominions of the crown, even though such person may be the child of an alien, unless such alien should be the subject of a hostile prince (*b*). And in *Calvin's case* (*c*), a person born in Scotland after the accession of James I. to the crown of England, was held to be a natural-born subject, and consequently entitled to hold lands in England, although the two kingdoms had not then been united. Again, the children of the Queen's ambassadors are natural-born subjects by the Common Law (*d*); and, by several Acts of Parliament, the privileges of natural-born subjects have been accorded to the lawful children, though born abroad, of a natural-born father, and also to the grandchildren on the father's side of a natural-born subject (*e*); and more recently, the children of a natural-born mother, though born abroad, were rendered capable of taking any real or personal estate (*f*). It was also provided that any woman, who should be married to a natural-born subject or person naturalized, should be taken to be herself naturalized, and have all the rights and privileges of a natural-born subject (*g*). And by a statute of the reign of William the Third all the king's natural-born subjects were enabled to trace their title by descent through their alien ancestors (*h*). Any foreigner may be made a denizen by the Queen's letters patent, and capable as such of acquiring lands by purchase, though not by descent (*i*), or may be

Denizen.

(*b*) 1 Black. Com. 373; Bacon's Abr. tit. Aliens (A).

(*c*) 7 Rep. 1.

(*d*) 7 Rep. 18 a.

(*e*) Stats. 25 Edw. III. stat. 2; 7 Anne, c. 5; 4 Geo. II. c. 21; 13 Geo. III. c. 21; *Doe dem. Duroure v. Jones*, 4 T. Rep. 300; *Shedden v. Patrick*, 1 Macqueen's H. of L. Cas. 535; *Fitch v. Weber*,

6 Hare, 51; see *De Geer v. Stone*, 22 Ch. D. 243.

(*f*) Stat. 7 & 8 Vict. c. 66, s. 3.

(*g*) Sect. 16.

(*h*) Stat. 11 & 12 Will. III. c. 6, explained by stat. 25 Geo. II. c. 39.

(*i*) 1 Black. Com. 374.

naturalized by Act of Parliament. But the Naturalization Act, 1870 (*j*), now provides (*k*) that real and personal property of every description may be taken, acquired, held and disposed of by an alien in the same manner in all respects as by a natural-born British subject; and a title to real and personal property of every description may be derived through, from or in succession to an alien in the same manner in all respects as through, from or in succession to a natural-born British subject. This Act repeals many of the former statutes with respect to aliens, and contains several important amendments of the general law on this subject.

The Naturalization Act, 1870.

Infants, or all persons under the age of twenty-one years, and also *idiots* and *lunatics*, though they may hold lands, are incapacitated from making a binding disposition of any estate in them. The conveyances of infants are generally voidable only (*l*), and those of lunatics and idiots appear to be absolutely void, unless they were made by feoffment with livery of seisin before the year 1845 (*m*). But by a recent Act of Parliament (*n*), every infant, not under twenty if a male, and not under seventeen if a female, is empowered to make a valid and binding settlement on his or her marriage, with the sanction of the Chancery Division of the High Court. If, however, any disentailing assurance shall have been executed by an infant tenant in tail under

Infants, idiots, and lunatics.

Infants' marriage settle-

(*j*) Stat. 33 Vict. c. 14, passed 12th May, 1870, amended by stats. 33 & 34 Vict. c. 102, and 35 & 36 Vict. c. 39. This statute is not retrospective. *Sharp v. St. Sauveur*, L. R., 7 Ch. Ap. 343.

(*k*) 33 Vict. c. 14, s. 2.

(*l*) 2 Black. Com. 291; Bac. Abr. tit. Infancy and Age (I 3); *Zouch v. Parsons*, 3 Burr. 1794; *Allen v. Allen*, 2 Dru. & War.

307, 338.

(*m*) *Vates v. Boen*, 2 Strange, 1104; Sugd. Pow. 601, 8th ed.; Bac. Abr. tit. Idiots and Lunatics (F); stats. 7 & 8 Vict. c. 76, s. 7; 8 & 9 Vict. c. 106, s. 4.

(*n*) Stat. 18 & 19 Vict. c. 43, extended to the Court of Chancery in Ireland by stat. 23 & 24 Vict. c. 83; *Re Dalton*, 6 De Gex, Mac. & Gor. 201.

the provisions of the Act, and such infant shall afterwards die under age, such disentailing assurance shall thereupon become absolutely void (*o*). Under certain circumstances, also, for the sake of making a title to lands, infants have been empowered, by modern Acts of Parliament, to make conveyances of fee simple and other estates, under the direction of the Chancery Division of the High Court (*p*). And more extensive powers, with respect to the estates of idiots and lunatics, have been given to their *committees*, or the persons who have had committed to them the charge of such idiots and lunatics (*q*). Power is also given to the Chancery Division of the High Court in the case of infants (*r*), and to the Lord Chancellor or either of the Lords Justices (*s*), intrusted by virtue of the Queen's sign manual with the care of the persons and estates of idiots and lunatics (*t*), by a simple order, to vest in any other person the lands of which any infant, idiot or lunatic may be seised or possessed upon any trust or by way of mortgage. The Supreme Court of Judicature Act, 1875 (*u*), provides that any jurisdiction usually vested in the Lords Justices of Appeal in Chancery, or either of them, in relation to the persons and estates of idiots, lunatics and persons of unsound mind, shall be exercised by such judge or judges of the High Court of

Supreme
Court of
Judicature
Act, 1875.

(*o*) Stat. 18 & 19 Vict. c. 43, s. 2.

(*p*) See stats. 11 Geo. IV. & 1 Will. IV. c. 47, s. 11; 11 Geo. IV. & 1 Will. IV. c. 65, ss. 12, 16, 31; 2 & 3 Vict. c. 60; 11 & 12 Vict. c. 87.

(*q*) See stat. 16 & 17 Vict. c. 70, s. 108 et seq., repealing and consolidating stats. 11 Geo. IV. & 1 Will. IV. c. 65, and 15 & 16 Vict. c. 48, and other Acts, so far as they relate to idiots and lunatics in England and Wales.

This Act has been amended by stat. 18 & 19 Vict. c. 13, and extended by stat. 25 & 26 Vict. c. 86. See also stat. 45 & 46 Vict. c. 38, s. 62.

(*r*) "The Trustee Act, 1850," stat. 13 & 14 Vict. c. 60, ss. 7, 8.

(*s*) Stat. 30 & 31 Vict. c. 87, s. 13.

(*t*) Stats. 13 & 14 Vict. c. 60, ss. 3, 4; 15 & 16 Vict. c. 55, s. 11.

(*u*) Stat. 38 & 39 Vict. c. 77, s. 7.

Justice or Court of Appeal as may be intrusted by the Queen's sign manual with the care and commitment of the custody of such persons and estates. A provision of the Conveyancing Act of 1881 (*x*), enables the High Court of Justice to authorize the same leases, sales and improvements of an infant's estate in fee simple as the Court has power to authorize in the case of a settled estate by virtue of the Settled Estates Act, 1877 (*y*). And under the Settled Land Act, 1882 (*z*), the powers of leasing, sale and other powers given to a tenant for life by that Act (*a*), may be exercised in respect of any land, to which an infant is in his own right entitled in possession, on the infant's behalf by the trustees of settlement or such other person as the Court orders.

Married women, whose marriage took place before the 1st of January, 1883 (*b*), are under a partial incapacity to alienate, as will hereafter appear. And before the abolition of forfeiture for treason and felony (*c*) persons attainted for these crimes could not, by any conveyance which they might make, defeat the right to their estates, which their attainder gave to the crown, or to the lord, of whom their estates were holden (*d*).

There are certain objects, also, in respect of which the alienation of lands is restricted. In the reign of George II. an Act was passed, commonly called the Mortmain Act, the object of which, as expressed in the

(*x*) Stat. 44 & 45 Vict. c. 41, s. 41; see Williams's Conveyancing Statutes, 200—203.

(*y*) Stat. 40 & 41 Vict. c. 18; see ante, pp. 34, 48.

(*z*) Stat. 45 & 46 Vict. c. 38, ss. 59, 60; see Williams's Conveyancing Statutes, 364.

(*a*) See ante, pp. 35—38, 43—46, 49—54.

(*b*) The date of the commencement of the Married Women's Property Act, 1882.

(*c*) By stat. 33 & 34 Vict. c. 23, passed 4th July, 1870.

(*d*) Co. Litt. 42 b; 2 Black. Com. 290; Perkins, tit. Grant, sect. 26; Com. Dig. tit. Capacity (D) 6; 2 Shcp. Touch. 232; *Doe d. Griffith v. Pritchard*, 5 Barn. & Adol. 765.

Leasing and
sales of land

Married
women.

Attainted
persons.

Excepted
objects.

The Mort-
main Act.

Charities.

preamble, was to prevent improvident alienations or dispositions of landed estates, by languishing or dying persons, to the disherison of their lawful heirs (*e*). This statute provides that no lands or hereditaments, nor any money, stock or other personal estate, to be laid out in the purchase of any lands or hereditaments, shall be conveyed or settled for any charitable uses, unless such lands or hereditaments, or money or personal estate (other than stock in the public funds) be conveyed by deed indented, sealed and delivered in the presence of two or more credible witnesses, twelve calendar months at least before the death of the donor or grantor, including the days of the execution and death, and inrolled in the High Court of Chancery (*f*) within six calendar months next after the execution thereof; and unless such stock be transferred six calendar months at least before the death of the donor or grantor, including the days of the transfer and death; and unless the same be made to take effect in possession for the charitable use intended immediately from the making thereof, and be without any power of revocation, reservation, trust, condition, limitation, clause or agreement whatsoever, for the benefit of the donor or grantor, or of any person or persons claiming under him (*g*). Provided always, that nothing therein before mentioned relating to the sealing and delivering of any deed twelve calendar months at least before the death of the grantor, or to the transfer of any stock six calendar months before the death of the grantor, shall extend to any purchase of any estate or interest in lands or hereditaments, or any transfer of stock to be made really and bonâ fide for a full and valuable consideration actually paid at or before the making of

(*e*) Stat. 9 Geo. II. c. 36.

(*f*) Such a deed may now be inrolled in the Central Office of the Supreme Court: stats. 36 &

37 Vict. c. 66, ss. 16, 77; 42 & 43 Vict. c. 78; Rules of the Supreme Court, 1883, Order LXI. r. 9.

(*g*) Stat. 9 Geo. II. c. 36, s. 1.

such conveyance or transfer, without fraud or collusion (*h*). And all gifts, conveyances and settlements for any charitable uses whatsoever made in any other manner or form than by that Act is directed, are declared to be absolutely and to all intents and purposes null and void (*i*). Gifts to either of the two Universities, or any of their colleges, or to the college of Eton, Winchester or Westminster, for the support and maintenance of the scholars only upon those foundations, are excepted (*k*). It will be seen that in consequence of this Act no gift of any estate in land for charitable purposes can be made by will. By an Act of Parliament passed on the 25th July, 1828 (*l*), the title to lands then already purchased for valuable consideration for charitable purposes is rendered valid, notwithstanding the want of an indenture duly attested and inrolled; but the Act is retrospective merely (*m*).

The stringency of the provisions in the Mortmain Act has often been felt to be unnecessarily great, especially with regard to that part of the Act which provides that there shall be no reservation or clause whatever for the benefit of the donor or grantor. And several Acts have recently been passed to amend the law relating to the conveyance of land for charitable uses. One Act (*n*), which was passed on the 17th of May, 1861, provides that no assurance for charitable uses shall be void by reason of the deed or assurance not being indented, or not purporting to be indented, nor by reason of such deed or assurance, or any deed forming part of the same transaction, containing any grant or reservation of any peppercorn or other nominal

New enact-
ments.

allowed.

(*h*) Sect. 2.

(*i*) Sect. 3.

(*k*) Sect. 4.

(*l*) Stat. 9 Geo. IV. c. 85.

(*m*) Stat. 9 Geo. IV. c. 85, s. 3.

(*n*) Stat. 24 Vict. c. 9. Provisions were made with respect to Roman Catholic Charities by an Act of the previous session, stat. 23 & 24 Vict. c. 134.

Separate deed
of trust.

rent, or of any mines or minerals or easement, or any covenants or provisions as to the erection, repair, position, or description of buildings, the formation or repair of streets or roads, drainage or nuisance, or any covenants or provisions of the like nature, for the use and enjoyment as well of the hereditaments comprised in such deed or assurance as of any other adjacent or neighbouring hereditaments, or any right of entry on non-payment of any such rent, or on breach of any such covenant or provision, or any stipulations of the like nature, for the benefit of the donor or grantor, or of any person or persons claiming under him; nor in the case of copyholds by reason of the assurance not being made by deed; nor in the case of such assurances made *bonâ fide* on a sale for a full and valuable consideration, by reason of such consideration consisting wholly or partly of a rent, rent-charge or other annual payment, reserved or made payable to the vendor or to any other person, with or without a right of re-entry for non-payment thereof: provided that in all reservations authorized by the Act, the donor, grantor or vendor shall reserve the same benefits for his representatives as for himself (*o*). The Act further provides, that in all cases where the charitable uses of any deed or assurance thereafter to be made for conveyance of any hereditaments for any charitable uses shall be disclosed by any separate deed, the deed of conveyance need not be inrolled: but it will be void, unless such separate deed be inrolled in the Central Office of the Supreme Court within six calendar months next after the making or perfecting of the deed for conveyance (*p*).

Remarks on
the Act.

This Act, it will be observed, provided only for the reservation of a *nominal* rent, except in the case of an

(*o*) Stat. 24 Vict. c. 9, s. 1. 42 & 43 Vict. c. 78; Rules of the
(*p*) Stats. 24 Vict. c. 9, s. 2; Supreme Court, 1883, Order LXI.
36 & 37 Vict. c. 66, ss. 16, 77; r. 9.

assurance made *bonâ fide* on a sale for a full and valuable consideration; so that a gift of land to a charity, reserving a pecuniary rent or rent-charge to the grantor, would still have been void. Moreover no alteration was made in that part of the Mortmain Act which relates to the execution of the deed twelve calendar months at least before the death of the grantor. The only exception which that Act allowed was in the case of a purchase of land *bonâ fide*, for a full and valuable consideration actually paid *at or before* the making of the conveyance. If on a purchase a rent were reserved to the vendor, it is clear that the full consideration was not actually paid at the making of the conveyance. There was nothing in the new Act, as there was certainly nothing in the former one, to preserve such a conveyance from becoming void by the decease of the vendor within twelve calendar months from the date of the deed. This oversight in the Act has been provided for by a more recent statute (*q*), which enacts that every full and *bonâ fide* valuable consideration which shall consist either wholly or partly of a rent or other annual payment reserved or made payable to the vendor or grantor, or to any other person, shall, for the purposes of the Mortmain Act, be as valid and have the same force and effect as if such consideration had been a sum of money actually paid at or before the making of such conveyance without fraud or collusion.

New enactment.

With regard to deeds and assurances already made it has been provided by another Act (*r*), that all money really and *bonâ fide* expended before the 16th of May, 1862, the date of the Act, in the substantial and permanent improvement, by building or otherwise for any charitable use, of land held for such charitable use, shall be deemed equivalent to money actually paid by

As to alms Money, &c. in improvement.

(*q*) Stat. 27 Vict. c. 13, s. 4.

(*r*) Stat. 25 Vict. c. 17, s. 5.

Demise to
commence
within a year.

way of consideration for the purchase of the said land. It has also been provided (*s*), that every deed or assurance by which any land shall have been demised for any term of years for any charitable use shall, for the purposes of the Mortmain Act, be deemed to have been made to take effect for the charitable use thereby intended immediately from the making thereof, if the term for which such land shall have been thereby demised was made to commence and take effect in possession at any time within one year from the date of such deed or assurance. And it has been further provided, with respect to all deeds and assurances under which possession is held for any charitable uses, that if made *bonâ fide* for a full and valuable consideration, actually paid at or before the making of such deed or assurance, or reserved by way of rent, rent-charge, or other annual payment, or partly paid and partly so reserved, no such deed or assurance shall be void within the Mortmain Act, if it was made to take effect in possession for the charitable uses intended immediately from the making thereof, and without any power of revocation, and has been inrolled in the Court of Chancery before the 17th of May, 1866 (*t*). And all conveyances to charitable uses made upon such full and valuable consideration as aforesaid, and under which possession is held for such uses, are rendered valid where any separate deed declaring the uses has alone been inrolled, or where such separate deed shall have been executed within six calendar months from the 13th of May, 1864, and inrolled before the 17th of May, 1866 (*u*). Where the original deed creating any charitable trust has been lost, the Chancery Division of the High Court is empowered to authorize the inrolment in its stead of any subsequent deed by which the

Where
original deed
lost.

(*s*) Stat. 26 & 27 Vict. c. 106.

(*u*) Stats. 24 Vict. c. 9, s. 4;

(*t*) Stats. 24 Vict. c. 9, s. 3; 27 Vict. c. 13, ss. 1, 2.

27 Vict. c. 13, s. 1.

OF AN ESTATE IN FEE SIMPLE.

trusts may sufficiently appear (*x*). And power is now given to the clerk of inrolments to inrol any conveyance for charitable uses, if he be satisfied that the same was made really and bonâ fide for full and valuable consideration actually paid at or before the making and perfecting thereof, or reserved by way of rent-charge or other annual payment, or partly paid and partly reserved as aforesaid, without fraud or collusion, and that at the time of the application to the said clerk possession or enjoyment is held under such instrument, and that the omission to inrol the same in proper time has arisen from ignorance or inadvertence, or from the destruction thereof by time or accident (*y*). When land has been already devoted to charitable purposes, the conveyance thereof to other trustees, or to another charity, does not fall within the purview of the Mortmain Act, and accordingly requires no special attestation or inrolment (*z*). The acknowledgment of deeds prior to inrolment is now abolished (*a*).

Power to
inrol.

Land already
in mortmain.

There are certain charitable and public institutions, which have been exempted from the operation of the Mortmain Act by special Acts of Parliament (*b*). All endowed charities are now placed under the control of the Charity Commissioners for England and Wales (*c*). Endowed schools were for a time placed under the care of certain commissioners, called the Endowed School

Special ex-
emptions
from Mort-
main Act.

The Charity
Commis-
sioners.

Endowed
schools.

) Stat. 27 Vict. c. 13, s. 3.

(*y*) Stat. 35 & 36 Vict. c. 24, s. 13, which now supersedes stat. 29 & 30 Vict. c. 57, by which power to authorize inrolments in these cases was given to the Court of Chancery.

(*z*) *Walker v. Richardson*, 2 Mees. & Wels. 882; *Attorney-General v. Glyn*, 12 Sim. 84; *Ashton v. Jones*, 28 Beav. 460.

(*a*) Stat. 31 & 32 Vict. c. 44, s. 3.

(*b*) See 1 Jarm. Wills, 241, 242, 4th ed.

(*c*) Stat. 16 & 17 Vict. c. 137, amended by stats. 18 & 19 Vict. c. 124, and 23 & 24 Vict. c. 136, explained by stat. 25 & 26 Vict. c. 112, and amended by stat. 32 & 33 Vict. c. 110.

Official
trustee.

Majority of
charity at
a meeting
may convey.

Commissioners (*d*). But all their powers and duties are now transferred to and imposed on the Charity Commissioners (*e*). An official trustee of charity lands has been appointed, in whom may be vested, by order of the Chancery Division of the High Court or of any judge having jurisdiction, any charity lands whenever the trustees do not or will not act, or there are no trustees, or none certainly known, or where any of the trustees are under age, lunatic or of unsound mind, or otherwise incapable of acting, or out of the jurisdiction of the Court, or where a valid appointment of new trustees cannot be made, or shall be considered too expensive (*f*). But it is now provided that where the trustees of a charity have power to determine on any disposition of any property of the charity, a majority, who are present at a meeting of their body duly constituted and vote on the question, shall have, and be deemed to have always had, full power to execute and do all such assurances, acts and things as may be requisite for carrying any such disposition into effect; and all such assurances, acts and things shall have the same effect as if they were respectively executed and done by all such trustees and by the official trustee of charity lands (*g*).

Sites for
schools.

An important exception to the Mortmain Act has introduced by Acts of Parliament passed to afford further facilities for the conveyance and endowment of sites for schools (*h*), by which one witness only is

(*d*) Stat. 32 & 33 Vict. c. 56,
amended by stat. 36 & 37 Vict.
c. 87.

(*e*) Stat. 37 & 38 Vict. c. 87.

(*f*) Stats. 16 & 17 Vict. c. 137,
s. 48; 18 & 19 Vict. c. 124, s. 15.

(*g*) Stat. 32 & 33 Vict. c. 110,
s. 12, repealing stat. 23 & 24 Vict.

c. 136, s. 16.

(*h*) Stat. 4 & 5 Vict. c. 38, ex-
plained by stat. 7 & 8 Vict. c. 37,
extended and further explained by
stat. 12 & 13 Vict. c. 49, amended
by stat. 14 & 15 Vict. c. 24; and
extended by stat. 15 & 16 Vict.
c. 49.

rendered sufficient for such a conveyance (*i*), and the death of the donor or grantor within twelve calendar months from the execution of the deed will not render it void (*k*). But by these Acts the necessity of inrolment does not appear to have been dispensed with (*l*). These Acts contain many other provisions for facilitating the erection of schools for the education of the poor. And, by more recent Acts of Parliament, provision has been made for the conveyance of sites for literary and scientific and other similar institutions (*m*); for facilitating grants of land for the recreation of adults, and as play-grounds for children (*n*); and also to afford further facilities for the conveyance of land for sites for places of religious worship and for burial places (*o*). A further important inroad upon the Mortmain Act has also been made by an Act (*p*), which provides that all alienations, except by will, *bonâ fide* made after the passing of that Act to a trustee or trustees on behalf of any society or body of persons associated together for religious purposes, or for the promotion of education, arts, literature, science, or other like purposes, of land for the erection thereon of a building for such purposes or any of them, or whereon a building used or intended to be used for such purposes or any of them shall have been erected, shall be exempt from the provisions of the Mortmain Act, and from the provisions of the 2nd section of the Act 24 Vict. c. 9 (*q*): provided such disposition shall have been really and *bonâ fide* made for a full and valuable consideration actually paid upon or before the making thereof, or reserved by way of rent, rent-charge, or other annual

Literary and
scientific in-
stitutions.

Play-
grounds.
Sites for
places of
worship and
burial.

Further ex-
ception in
favour of
religious

arts,
science,

(*i*) Stat. 4 & 5 Vict. c. 38,
s. 10.

(*k*) Stat. 7 & 8 Vict. c. 37, s. 3.

(*l*) See stat. 4 & 5 Vict. c. 38,
s. 16.

(*m*) Stat. 17 & 18 Vict. c. 112.

(*n*) Stat. 22 Vict. c. 27.

(*o*) Stat. 36 & 37 Vict. c. 50.

(*p*) Stat. 31 & 32 Vict. c. 44,
passed 13th July, 1868.

(*q*) Ante, p. 94.

Public Parks,
Schools, and
Museums
Act, 1871.

payment, or partly paid and partly reserved as afore-
said, without fraud or collusion, and provided that each
such piece of land shall not exceed two acres in extent
or area in each case. The deed or instrument of dis-
position may at any time be inrolled in the Central
Office of the Supreme Court if thought fit (*r*). And by
a more recent statute all gifts and assurances of land of
any tenure, by deed, or by will or codicil, for the pur-
poses only of a public park, a school-house for an ele-
mentary school, or a public museum, are rendered valid
notwithstanding the Statutes of Mortmain (*s*). But
every such will or codicil, and every such deed made
otherwise than for full and valuable consideration, must
be made twelve calendar months at least before the
death of the testator or grantor, and must be inrolled
in the books of the charity commissioners within six
calendar months next after the time when the same
shall come into operation (*t*). But the Act does not
authorize any gift by will or codicil of more than twenty
acres of land for any one public park, or of more than
two acres of land for any one public museum, or of more
than one acre of land for any one school-house (*u*).

Corporation.

Again, no conveyance can be made to any *corpo-
ration*, unless a licence to take lands has been granted
to it by the crown. Formerly, licence from the lord,
of whom a tenant in fee simple held his estate, was
also necessary to enable him to alienate his lands to
any corporation (*x*). For, this alienation to a body
having perpetual existence was an injury to the lord,
who was then entitled to many advantages, to be here-
after detailed, so long as the estate was in private
hands; but in the hands of a corporation these advan-

(*r*) Stats. 31 & 32 Vict. c. 44,
s. 2; 36 & 37 Vict. c. 66, ss. 16,
77; 42 & 43 Vict. c. 78; Rules
of the Supreme Court, 1883, Order
LXI. r. 9.

(*s*) Stat. 34 Vict. c. 13, s. 4.

(*t*) Sect. 5.

(*u*) Sect. 6.

2 Black. Com. 269.

tages ceased. In modern times, the rights of the lords having become comparatively trifling, the licence of the crown alone has been rendered by Parliament sufficient for the purpose (*y*). And it is now provided that any incorporated charity may, with the consent of the charity commissioners, invest money arising from any sale of land belonging to the charity, or received by way of equality of exchange or partition, in the purchase of land; and may hold such land or any land acquired by way of exchange or partition for the benefit of such charity, without any licence in mortmain (*z*). It is further provided (*a*), that all corporations and trustees in the United Kingdom holding monies in trust for any public or charitable purpose may invest such monies on any real security authorized by or consistent with the trusts on which such monies are held, without being deemed thereby to have acquired or become possessed of any land within the meaning of the laws relating to mortmain or of any prohibition or restraint against the holding of land by such corporations or trustees contained in any charter or Act of Parliament. And no contract for or conveyance of any interest in land made bonâ fide for the purpose only of such security shall be deemed void by reason of any noncompliance with the conditions and solemnities required by the Mortmain Act. Provision has been lately made for the incorporation of trustees of charities for religious, educational, literary, scientific and public charitable purposes by means of a certificate of registration of the trustees as a corporate body, to be granted by the Charity Commissioners of England and Wales, with power to hold and convey lands in the same manner as the trustees might do without such incorporation (*b*). Every joint-stock company registered under

Incorporated charities.

Incorporation of trustees of certain charities.

Joint-stock companies.

(*y*) Stat. 7 & 8 Will. III. c. 37.(*a*) Stat. 33 & 34 Vict. c. 34.(*z*) Stat. 18 & 19 Vict. c. 124,(*b*) Stat. 35 & 36 Vict. c. 24.

the Joint-Stock Companies Acts (*c*) has also power to hold lands (*d*); but no company formed for the purpose of promoting art, science, religion, charity or any other like object, not involving the acquisition of gain by the company or by the individual members thereof, shall, without the sanction of the Board of Trade, hold more than two acres of land; but the Board of Trade may, by licence under the hand of one of their principal or assistant secretaries, empower any such company to hold lands in such quantity and subject to such conditions as they think fit (*e*).

Conveyances
for defraud-
ing creditors.

Voluntary

clause of re-
vocation, void
as against
purchasers.

By a statute of the reign of Elizabeth, conveyances of landed estates, and also of goods, made for the purpose of delaying, hindering or defrauding creditors, are void as against them; unless made upon *good*, which here means *valuable*, consideration, and *bond fide*, to any person not having, at the time of the conveyance, any notice of such fraud (*f*). And, by a subsequent statute of the same reign and the judicial interpretation of the words thereof, voluntary conveyances of any estate in lands, tenements, or other hereditaments whatsoever, and conveyances of such estates made with any clause of revocation at the will of the grantor, are also void as against subsequent purchasers for money or other valuable consideration (*g*). The effect of this enactment is, that any person who

(*c*) Stat. 19 & 20 Vict. c. 47, amended by stats. 20 & 21 Vict. c. 14, and 21 & 22 Vict. c. 60, and now consolidated by stat. 25 & 26 Vict. c. 89, and amended by stat. 30 & 31 Vict. c. 131.

(*d*) Stat. 25 & 26 Vict. c. 89, s. 18.

(*e*) Sect. 21.

(*f*) Stat. 13 Eliz. c. 5; *Twyne's case*, 3 Rep. 81 a; 1 Smith's

Leading Cases, 1; *Spencer v. Slater*, 4 Q. B. D. 13; *Re Johnson*, *Golden v. Gillam*, 20 Ch. D. 389.

(*g*) Stat. 27 Eliz. c. 4, made perpetual by 39 Eliz. c. 18, s. 31. See 2 Dart's V. & P. 889, 890, 5th ed., and the cases there cited; Williams on Settlements, p. 354.

has made a voluntary settlement of landed property, even on his own children, may afterwards sell the same property to any purchaser; and the purchaser, even though he have full notice of the settlement, will hold the lands without danger of interruption from the persons on whom they had been previously settled (*h*). But if the settlement be founded on any valuable consideration, such as that of an intended marriage, it cannot be defeated

The methods by which a tenant in fee simple can alienate his estate in his lifetime will be reserved for future consideration, as will also the subject of alienation by testament. As a tenant in fee simple may alienate his estate at his pleasure, so he is under no control in his management of the lands, but may open mines, cut timber, and commit waste of all kinds (*k*), grant leases of any length, and charge the lands with the payment of money to any amount. Fee simple estates are moreover subject in the hands of the heir or devisee, to *debts* of all kinds contracted by the deceased tenant. This liability to what may be called an involuntary alienation, has, like the right of voluntary alienation, been established by very slow degrees (*l*). It appears that, in the early periods of our history, the heir of a deceased person was bound, to the extent of the inheritance which descended to him, to pay such of the debts of his ancestor as the goods and chattels of the ancestor were not sufficient to satisfy (*m*). But the spirit

Debts.

(*h*) *Upton v. Bassett*, Cro. Eliz. 444; 3 Rep. 83 a; Sugd. Vend. & Pur. 586, 13th ed.; Sugd. Pow., ch. 14, 8th ed.

(*i*) *Colvile v. Parker*, Cro. Jac. 158; Sugd. Pow., ch. 14, 8th ed.

(*k*) 3 Black. Com. 223.

(*l*) See Co. Litt. 191 a, n. (1), vi. 9.

(*m*) Glanville, lib. vii. c. 8, Bract. 61 a; 1 Reeves's Hist. Eng. Law, 813.. These authorities appear to be express; the contrary doctrine, however, with an account of the reasons for it, will be found in Bac. Abr. tit. Heir and Ancestor (F).

Heirs might
anciently be
bound by
specialty.

Assets.

of feudalism, which attained to such a height in the reign of Edward I., appears to have infringed on this ancient doctrine; for we find it laid down by Britton, who wrote in that reign, that no one should be held to pay the debt of his ancestor, whose heir he was, to any other person than the king, unless he were by the deed of his ancestor especially bound to do so (*n*). On this footing the law of England long continued. It allowed any person, by any deed or writing under seal (called a special contract or specialty) to bind or charge his heirs, as well as himself, with the payment of any debt, or the fulfilment of any contract; in such a case the heir was liable, on the decease of his ancestor, to pay the debt or fulfil the contract, to the value of the lands which had descended to him from the ancestor, but not further (*o*). The lands so descended were called *assets* by descent, from the French word *assez*, enough, because the heir was bound only so far as he had lands descended to him enough or sufficient to answer the debt or contract of his ancestor (*p*). If, however, the heir was not expressly named in such bond or contract, he was under no liability (*q*). When the power of testamentary alienation was granted, a debtor, who had thus bound his heirs, became enabled to defeat his creditor, by devising his estate by his will to some other person than his heir; and, in this case, neither heir nor devisee was under any liability to the cre-

(*n*) Britt. 64 b.

(*o*) Bac. Abr. tit. Heir and Ancestor (F); Co. Litt. 376 b.

(*p*) 2 Black. Com. 244; Bac. Abr. tit. Heir and Ancestor (1).

(*q*) Dyer, 271 a, pl. 25; Plow. 457. By the Conveyancing and Law of Property Act, 1881, stat. 44 & 45 Vict. c. 41, s. 59, a covenant, and a contract under seal, and a bond or obligation

under seal, made after the 31st December, 1881, though not expressed to bind the heirs, shall, so far as a contrary intention is not expressed therein and subject to the terms thereof, operate in law to bind the heirs and real estate, as if heirs were expressed; see Williams's Conveyancing Statutes, 234, 235.

ditor (r). Some debtors, however, impelled by a sense of justice to their creditors, left their lands to trustees in trust to sell them for the payment of their debts, or, which amounts to the same thing, charged their lands, by their wills, with the payment of their debts. The creditors then obtained payment by the bounty of their debtor; and the Court of Chancery, in distributing this bounty, thought that "equality was equity," and consequently allowed creditors by simple contract to participate equally with those who had obtained bonds binding the heirs of the deceased (s). In such a case the lands were called *equitable assets*. Equitable assets. At length an Act of William and Mary made void all devises by will, as against creditors by specialty in which the heirs were bound, but not further or otherwise (t); but devises or dispositions of any lands or hereditaments for the payment of any real and just debt or debts were exempted from the operation of the statute (u). Creditors, however, who had no specialty binding the heirs of their debtor, still remained without remedy against either heir or devisee; unless the debtor chose of his own accord to charge his lands by his will with the payment of his debts; in which case, as we have seen, all creditors were equally entitled to the benefit. So that, till the early part of the present century, a landowner might incur as many debts as he pleased, and yet leave behind him an unencumbered estate in fee simple, unless his creditors had taken proceedings in his lifetime, or he had entered into any bond or specialty binding his heirs. At length, in 1807, the fee simple estates of deceased *traders* were rendered liable to the payment, not only of debts in which their

Debt^s of de-
ced^t
tre

(r) Bac. Abr. ubi sup.

(s) *Parker v. Dee*, 2 Cha. Cas. 201; *Bailey v. Ekins*, 7 Ves. 319; 2 Jarm. Wills, 618, 4th ed.

(t) Stat. 3 Will. & Mary, c. 14, s. 2, made perpetual by stat. 6 & 7 Will. III. c. 14.

(u) Stat. 3 Will. & Mary, c. 14, s. 4.

In 1833 lands
became sub-
ject to all
debts.

Former effect
of a charge
of debts by
...

heirs were bound, but also of their simple contract deeds (*x*), or debts arising in ordinary business. By a subsequent statute (*y*), the above enactments were consolidated and amended, and facilities were afforded for the sale of such estates of deceased persons as were liable by law, or by their own wills, to the payment of their debts. But, notwithstanding the efforts of a Romilly were exerted to extend so just a liability, the lands of all deceased persons, not traders at the time of their death, continued exempt from their debts by simple contract, till the year 1833; when a provision, which, but a few years before, had been strenuously opposed, was passed without the least difficulty (*z*). All estates in fee simple, which the owner should not by his will have charged with, or devised subject to, the payment of his debts, were then rendered liable to be administered in the Court of Chancery, for the payment of all the just debts of the deceased owner, as well debts due on simple contract as on specialty. But, out of respect to the ancient law, the Act provided that all creditors by special contract, in which the heirs were bound, should be paid the full amount of the debts due to them before any of the creditors by simple contract, or by specialty in which the heirs were not bound, should be paid any part of their demands. If, however, the debtor should by his last will have charged his lands with, or devised them subject to, the payment of his debts, such charge was still valid, and every creditor, of whatever kind, had an equal right to participate in the produce. Hence arose this curious result, that a person who had incurred debts, both by simple contract, and by specialty in which he had bound his heirs, might, by merely charging his lands with the payment of his debts, place all his creditors on a level,

By stat. 47 Geo. III. c. 74.

(*z*) Stat. 3 & 4 Will. IV. c.

(*y*) Stat. 11 Geo. IV. & 1 Will. 104.

IV. c. 47.

so far as they might have occasion to resort to such lands; thus depriving the creditors by specialty of that priority to which they would otherwise have been entitled (*a*). This anomaly has now been remedied by an Act which provides that, in the administration of the estate of any person who shall die on or after the 1st of January, 1870, no debt or liability of such person shall be entitled to any priority or preference by reason merely that the same is secured by or arises under a bond, deed or other instrument under seal, or is otherwise made or constituted a specialty debt; but all the creditors of such person, as well specialty as simple contract, shall be treated as standing in equal degree and be paid accordingly out of the assets of such deceased person, whether such assets are legal or equitable; provided that the Act shall not prejudice or affect any lien, charge or other security which any creditor may hold or be entitled to for the payment of his debt (*b*). And under the Bankruptcy Act, 1883 (*c*), the estate of a deceased debtor, which is insufficient to pay all his debts in full, may, at the instance of a creditor, be administered in bankruptcy and distributed according to the law of bankruptcy. In bankruptcy, special and simple contracts debts are, and always have been, on an equal footing as regards payment (*d*).

All creditors

Insolvent.

may be administered in bankruptcy.

A creditor who has taken legal proceedings against his debtor, for the recovery of his debt, in the debtor's lifetime, and has obtained the *judgment* of a Court of law in his favour, has long had a great advantage over creditors who have waited till the debtor's decease. The first enactment which gave to such a creditor a remedy

Judgment debts.

(*a*) See the Author's Essay on Property, 282—285, 529, 12th ed. Real Assets, p. 39.

(*b*) Stat. 32 & 33 Vict. c. 46.

(*c*) Stat. 46 & 47 Vict. c. 52, s. 125; see Williams on Personal

(*d*) See Williams on Personal Property, 249—251, 12th ed.

against the lands of his debtor was made in the reign of Edward I. (*e*), shortly before the passing of the Statute of *Quia Emptores* (*f*), which sanctioned the full and free alienation of fee simple estates. By this enactment it is provided, that, when a debt is recovered or acknowledged in the King's Court, or damages awarded, it shall be thenceforth *in the election* of him that sueth for such debt or damages to have a writ of *fiери facias* unto the sheriff of the lands and goods (*g*), or that the sheriff deliver to him all the chattels of the debtor (saving only his oxen and beasts of his plough) (*h*), and *the one half of his land*, until the debt be levied according to a reasonable price or extent. The writ issued by the Court to the sheriff, under the authority of this statute, was called a writ of *elegit*; so named, because it was stated in the writ that the creditor had elected (*elegit*) to pursue the remedy which the statute had thus provided for him (*i*). One moiety only of the land was allowed to be taken, because it was necessary, according to the feudal constitution of our law, that, whatever were the difficulties of the tenant, enough land should be left him to enable him to perform the services due to his lord (*j*). The statute, it will be observed, was passed prior to the time when the alienation of estates in fee simple was sanctioned by Parliament; and there can be no doubt, that long after the passing of this statute the vendors and purchasers of landed property held a far less important place in legal con-

Writ of *elegit*.

(*e*) Stat. 13 Edw. I. c. 18, called the Statute of Westminster the Second.

(*f*) Stat. 18 Edw. I. c. 1.

(*g*) As to the writ of *fiери facias*, see Williams on Personal Property, 81, 12th ed.

(*h*) Since the commencement of the year 1884, it has no longer been possible to take the goods

of a debtor under a writ of *elegit*, and the writ has extended to lands and hereditaments only; see stat. 46 & 47 Vict. c. 52, s. 146, subs. 1; Williams on Personal Property, 83, and notes (*a*), (*b*), 12th ed.

(*i*) Co. Litt. 289 b; Bac. Abr. tit. Execution (C 2).

(*j*) Wright's Tenures, 170.

sideration than they do at present. This circumstance may account for the somewhat harsh construction, which was soon placed on this statute, and which continued to be applied to it, until its replacement by an enlarged and amended Act of modern date (*k*). It was held, that, if at the time when the judgment of the Court was given for the recovery of the debt, or awarding the damages, the debtor had lands, but afterwards sold them, the creditor might still, under the writ with which the statute had furnished him, take a moiety of the lands out of the hands of the purchaser (*l*). It thus became important for all purchasers of lands to ascertain, that those from whom they purchased had no *judgments* against them. For, if any such existed, one moiety of the lands would still remain liable to be taken out of the hands of the purchaser to satisfy the judgment debt or damages. It was also held that if the debtor purchased lands after the date of the judgment, and then sold them again, even these lands would be liable, in the hands of the purchaser, to satisfy the claims of the creditors under the writ of *elegit* (*m*). In consequence of the construction thus put upon the statute, judgment debts became incumbrances upon the title to every estate in fee simple, which it was necessary to discover and remove previously to every purchase. To facilitate purchasers and others in their search for judgments, an alphabetical docket or index of judgment was provided by an Act of William and Mary (*n*), to be kept in each of the Courts, open to public inspection and search. But, by an enactment of the present reign (*o*) these dockets have now been closed, Construction of the statute. Dockets. Now closed.

(*k*) Stat. 1 & 2 Vict. c. 110.

Prest. Abst. 323, 331, 332.

(*l*) *Sir John de Moleyn's case*, Year Book, 30 Edw. III. 24 a.

(*n*) Stat. 4 & 5 Will. & Mary, c. 20, made perpetual by stat. 7 & 8 Will. III. c. 36.

(*m*) *Brace v. Duchess of Marlborough*, 2 P. Wms. 492; Sugd. Vend. & Pur. 520, 14th ed.; 3

(*o*) Stat. 2 & 3 Vict. c. 11, ss. 1, 2.

and the ancient statute is, with respect to purchasers, virtually repealed (*p*).

Stat. 1 & 2
Vict. c. 110.

The whole of
the lands
could be
taken.

The rights of judgment creditors to follow the lands of their debtors in the hands of purchasers, were remodelled by an Act of Parliament of the present reign, passed for the purpose of extending the remedies of creditors against the property of their debtors (*q*). The old statute extended to only one half of the lands of the debtor; but, by this Act, the whole of the lands, and all other hereditaments of the debtor, could be taken under the writ of *elegit* (*r*). The power of the judgment creditor to take lands out of the hands of purchasers was no longer left to depend on a forced construction, such as that applied to the old statute; for this Act expressly extended the remedy of the judgment creditor to lands of which the debtor should *have been* seised or possessed at the time of entering up the judgment, or at any time afterwards. But, as we shall presently see, this extensive power has since been much curtailed. The judgment creditor was also expressly provided with a remedy in equity, that is, in the Court of Chancery, as well as at law (*s*). And the remedies provided by the Act were extended, in their application to all decrees, orders, and rules made by the Courts of equity and of common law, and by the Lord Chancellor or the Lords Justices in matters of bankruptcy, and by the Lord Chancellor in matters of lunacy, for the payment to any person of any money or costs (*t*). But before pur-

(*p*) See 1 Dart, V. & P. 456—462, 5th ed.

(*q*) Stat. 1 & 2 Vict. c. 110, amended by stats. 2 & 3 Vict. c. 11; 3 & 4 Vict. c. 82; 18 & 19 Vict. c. 15; and 23 & 24 Vict. c. 38.

(*r*) Sect. 11.

(*s*) Sect. 13.

(*t*) Sect. 18. See *Jones v. Wil-*

liams, 11 Ad. & Ell. 157; 8 Mees. & Wels. 349; *Doe v. Amey*, 8 Mees. & Wels. 565; *Wells v. Gibbs*, 3 Beav. 399; *Duke of Beaufort v. Phillips*, 1 De Gex & Smale, 321. As to the Lords Justices, see stats. 10 & 11 Vict. c. 102; 14 & 15 Vict. c. 83. As to entering satisfaction on judgments, see stat. 23 & 24 Vict. c. 115, s. 2.

chasers, mortgagees, or creditors could be affected under the provisions of this Act, the name, abode and description of the debtor, with the amount of the debt, damages, costs or money recovered against him, or ordered by him to be paid, together with the date of registration, and other particulars, were required to be registered in an Index which the Act directed to be kept for the warning of purchasers, at the office of the Court of Common Pleas (*u*). This registration was required to be repeated every five years (*x*); but the purchaser was bound if the judgment, decree, order, or rule were registered within five years before the execution of the conveyance to him, although more than five years should have elapsed since the last previous registration (*y*). If, however, the judgment, &c., were not so registered, or re-registered, the purchaser was not affected thereby, even though he should have had express notice of its existence (*z*); but the judgment creditor did not, by omitting to re-register, necessarily lose his priority, if once obtained, over subsequent judgments, though duly registered (*a*). And, by a further enactment, it was provided, in favour of purchasers without notice of any such judgments, decrees, orders or rules, that none of such judgments, &c., should bind or affect any lands, tenements, or hereditaments, or any interest therein, as against such purchasers without notice, further or otherwise, or more extensively in any respect, although duly registered, than a judgment of one of the superior Courts would have bound such purchasers before the last-mentioned Act, when it had been duly docketed according to the law then in force (*b*). More recently

Registry of judgments.

Re-registration.

Notice immaterial.

Protection to purchasers without notice.

Further Act.

(*u*) Stats. 1 & 2 Vict. c. 110, s. 19; 2 & 3 Vict. c. 11, s. 3; 18 & 19 Vict. c. 15, s. 10; Sugd. Vend. & Pur. 530 et seq., 14th ed.

(*x*) Stat. 2 & 3 Vict. c. 11, s. 4.

(*y*) Stat. 18 & 19 Vict. c. 15, s. 6.

(*z*) Stats. 3 & 4 Vict. c. 82, s. 2; 18 & 19 Vict. c. 15, ss. 4, 5.

(*a*) *Beavan v. The Earl of Oxford*, 6 De G., M. & G. 492.

(*b*) Stat. 2 & 3 Vict. c. 11, s. 5; *Lane v. Jackson*, 20 Beav. 535.

it was provided (c), that no judgment to be entered up after the 23rd of July, 1860, should affect any land as to a bonâ fide purchaser for valuable consideration, or a mortgagee (whether such purchaser or mortgagee had notice or not of such judgment), unless a writ or other due process of execution of such judgment should have been issued and registered, as provided by the Act, before the execution of the conveyance or mortgage to him, and the payment of the purchase or mortgage money by him. And no such judgment, nor any writ of execution or other process thereon, was to affect any land as to a bonâ fide purchaser or mortgagee, although execution or other process should have issued thereon and have been duly registered, unless such execution or other process should be executed and put in force within three calendar months from the time when it was registered. A registry of writs of execution was also provided (d); but as the entry was required to be made in alphabetical order by the names of the persons in whose behalf the judgments were registered, and not by the names of the debtors, it was still necessary to search for judgments in the registry above referred to (e).

New Act, lien
of judgments
abolished.

In the year 1864 an Act was passed which has entirely deprived all subsequent judgments of their lien on real estates (f). This Act provides that no judgment to be entered up after the passing of the Act (which took place on the 29th of July, 1864) shall affect any land, of whatever tenure, until such land shall have been actually delivered in execution by virtue of a writ of *elegit*, or other lawful authority, in pursuance of such judgment (g). In the construction of the Act, the term

(c) Stat. 23 & 24 Vict. c. 38,
s. 1.

(d) Sect. 2.

(e) Ante, p. 111.

(f) Stat. 27 & 28 Vict. c. 412.

(g) Sect. 1; *Guest v. Cowbridge Rail. Co.*, V.-C. G., 17 W. Rep. 7; L. R., 6 Eq. 619; *Thornton v. Finch*, 4 Giff. 515; *Hatton v. Haywood*, L. R., 9 Ch. 229; *Wells*

“judgment” is to be taken to include registered decrees, orders of courts of equity and bankruptcy, and other orders having the operation of a judgment (*h*). Every writ, by virtue whereof any land shall have been actually delivered in execution, must be registered in the manner provided by the last-mentioned Act (*i*), but in the name of the debtor against whom such writ or process is issued, instead of, as under that Act, in the name of the creditor. And no other registration of the judgment is necessary for any purpose (*k*). Every creditor to whom any land of his debtor shall have been actually delivered in execution by virtue of any judgment, and whose writ shall have been duly registered, may obtain from the Chancery Division of the High Court, upon petition in a summary way, an order for the sale of his debtor’s interest in such land (*l*). The other judgment creditors, if any, are to be served with notice of the order for sale; and the proceeds of the sale are to be distributed amongst the persons who may be found entitled thereto, according to their priorities (*m*). And every person claiming any interest in such land through or under the debtor, by any means subsequent to the delivery of such land in execution as aforesaid, is bound by every such order for sale, and by all the proceedings consequent thereon (*n*). This Act extends not only to judgments, but also to statutes and recognizances. Statutes merchant and statutes staple, which are here referred to, are modes of securing money that have long been obsolete (*o*). Recognizances are entered into before a court of record or a magistrate; and, like judgments, they

Writ to be
registered.

Order for
sale.

Statutes and
recognizances.

v. Kilpin, L. R., 18 Eq. 298;
Anglo-Italian Bank v. Davies, 9
Ch. D. 275; *Ex parte Evans*, 13
Ch. D. 252; *Smith v. Cowell*, 6
Q. B. D. 75; *Salt v. Cooper*, 16
Ch. D. 544.

(*h*) Stat. 27 & 28 Vict. c. 112,
s. 2.

(*i*) Stat. 23 & 24 Vict. c. 38.
(*k*) Stat. 27 & 28 Vict. c. 112,
s. 3.
(*l*) Sect. 4.
(*m*) Sect. 5.
(*n*) Sect. 6.
(*o*) See 2 Black. Comm. 160.

were a charge on lands until the passing of this Act (*p*). An Act was passed in the year 1868, to render judgments obtained in England, Scotland and Ireland effectual in any other part of the United Kingdom (*q*). In the year 1879, the registers or indexes of judgments and writs of execution were transferred to the Central Office of the Supreme Court (*r*), where all searches and registrations must now be made (*s*).

Counties
palatine.

Lands in either of the counties palatine of Lancaster or Durham were affected both by judgments of the Courts at Westminster, and also by judgments of the Palatine Court (*t*). These latter judgments had, within the county palatine, the same effect as judgments of the Courts at Westminster; and an index for their registration was established in each of the counties palatine, similar to the index of judgments at the Common Pleas (*u*). And by a statute of the present reign (*x*) it was provided that no judgment, decree, order or rule of *any Court* should bind lands in the counties palatine, as against purchasers, mortgagees, or creditors, until registration in the Court of the county palatine in which the lands were situate. And the same provisions as to re-registration within five years as applied to the registry of the Court of Common Pleas applied also to these registries (*y*). Lands in the county palatine of Chester, and in the principality of Wales, have been placed by a modern statute exclusively within the jurisdiction of the Courts at Westminster (*z*):

(*p*) See the author's "Principles of the Law of Personal Property," p. 130, 11th ed.; 157, 12th ed.

(*q*) Stat. 31 & 32 Vict. c. 54; see Williams's Conveyancing Statutes, 267.

(*r*) See Williams's Conveyancing Statutes, 268.

(*s*) See *ibid.* 262—274.

(*t*) 2 Wms. Saund. 194.

(*u*) Stat. 1 & 2 Vict. c. 110, s. 21.

(*x*) Stat. 18 & 19 Vict. c. 15, s. 2.

(*y*) Sect. 3.

(*z*) Stat. 11 Geo. IV. & 1 Will. IV. c. 70, s. 14.

and by another statute (*a*) the palatinate jurisdiction within the county of Durham, which formerly belonged to the bishop of Durham, has been transferred to the crown. The Supreme Court of Judicature Act, 1873 (*b*), transferred to the High Court of Justice thereby established the jurisdiction of the Court of Common Pleas at Lancaster and of the Court of Pleas at Durham (*c*), and any jurisdiction of the Court of Appeal in Chancery of the county palatine of Lancaster (*d*). But the jurisdiction of the Court of Chancery of the county palatine of Lancaster has not been thereby abolished.

Debts due, or which might have become due, to the crown, from persons who were accountants to the crown (*e*), and debts of record, or by bond or specialty, due from other persons to the crown (*f*), were, until recently, binding on their estates in fee simple when sold, as well as when devised by will, or suffered to descend to the heir at law. But any two (*g*) of the Commissioners of the Treasury were empowered, upon such terms as they might think proper, to certify by writing under their hands, that any lands of any crown debtor, or accountant to the crown, should be held by the purchaser or mortgagee thereof discharged from all further claims of her Majesty, her heirs or successors, in respect of any debt or liability of the debtor or

(*a*) Stat. 6 & 7 Will. IV. c. 19, amended by stat. 21 & 22 Vict. c. 45.

(*b*) Stat. 36 & 37 Vict. c. 66, postponed to 1st November, 1875, by stat. 37 & 38 Vict. c. 83.

(*c*) Sect. 16, subsects. (9) and (10).

(*d*) Sect. 17, subsect. (2).

(*e*) Stat. 13 Eliz. c. 4; 25 Geo. III. c. 35; Co. Litt. 191 a, n. (1), vi. 9. See also stats. 1 & 2 Geo.

IV. c. 121, s. 10, 2 & 3 Vict. c. 11, ss. 9, 10, 11; Sugd. Vend. & Pur. 544, 14th ed.

(*f*) Stat. 33 Hen. VIII. c. 39, ss. 50, 75. But simple contract debts due to the crown by the vendor were not binding on the purchaser unless he had notice of them; *King v. Smith, Wightw.* 34; *Casberd v. Attorney-General*, 6 Price, 474.

(*g*) Stat. 12 & 13 Vict. c. 89.

accountant to whom such lands belonged (*h*). And a similar power was more recently given to any two of the commissioners, or other principal officers, of any public department with respect to any crown bond or other security concerning or incident to any such department; or if there were only one such commissioner or officer then the power was vested in him (*i*). To obviate the dangerous liability of purchasers to crown debts, an index was opened at the Common Pleas of the names of crown debtors; and lands could not be charged, in the hands of purchasers, with these liabilities, unless the name, abode and description of the debtor, with other particulars, were inserted in the proper index (*k*). And from the 31st of December, 1859, the provisions already mentioned for the re-registry of judgments every five years were applied to crown debts; and notice of any crown debt not duly re-registered was rendered of no avail against a purchaser (*l*). But now, by the Crown Suits, &c. Act, 1865, no debts or liabilities to the crown incurred after the 1st of November, 1865 (*m*), shall affect any land as to a bonâ fide purchaser for valuable consideration or a mortgagee, whether such purchaser or mortgagee have or have not notice thereof, unless a writ or process of execution has been issued and registered before the execution of the conveyance or mortgage to such purchaser or mortgagee and the payment by him of the purchase or mortgage money (*n*). This registration must be effected in the manner prescribed by the Act, and was formerly

New enact-
ments.

Registration.

Stat. 2 & 3 Vict. c. 11,
s. 10.

(*i*) Stats. 16 & 17 Vict. c. 107,
ss. 195—197; 23 & 24 Vict. c. 115,
s. 1.

(*k*) Stat. 2 & 3 Vict. c. 11, s. 8;
Williams's Conveyancing Sta-
tutes, 264.

(*l*) Stat. 22 & 23 Vict. c. 35,
s. 22; Williams's Conveyancing
Statutes, 265. Purchasers were
indebted for this protection to the
late Lord St. Leonards.

(*m*) Stat. 28 & 29 Vict. c. 104,
s. 4.

(*n*) Sect. 48; Williams's Con-
veyancing Statutes, 267.

required to be made in the office of the Master of the Court of Common Pleas (*o*). It is now made in the Central Office of the Supreme Court (*p*). No other registration of the writ or process or of the debt or liability is now necessary for any purpose (*q*).

Actions at law or in equity respecting the lands will also bind a purchaser as well as the heir or devisee; that is, he must abide by the result, although he may be ignorant that any such proceedings are depending (*r*). A provision has accordingly been made for the registration of every *lis pendens*; and no *lis pendens* binds a purchaser or mortgagee without express notice thereof, unless and until it is duly registered; and the registration to be binding must be repeated every five years (*s*). This registration is now made in the Central Office of the Supreme Court (*t*). And the Court before whom the property sought to be bound is in litigation is now empowered, on the determination of the *lis pendens*, or during its pendency if satisfied that the litigation is not prosecuted bonâ fide, to order the registration to be vacated without the consent of the party by whom the *lis pendens* was registered (*u*). The index of pending suits, together with the indexes of writs of execution, are accordingly searched previously to every purchase of lands; and, if the name of the vendor should be found in either, the debt or liability must be got rid of, before the purchase can be safely completed.

Lis pendens.

Registration may be vacated.

By the Conveyancing Act, 1882 (*x*), provision is made for official searches in the Central Office of the

Official search for entries of judgments,

(*o*) Sect. 49.

(*s*) Stat. 2 & 3 Vict. c. 11, s. 7.

(*p*) See Williams's Conveyancing Statutes, 268.

(*t*) See Williams's Conveyancing Statutes, 264, 268.

(*q*) Stat. 28 & 29 Vict. c. 104, s. 49.

(*u*) Stat. 30 & 31 Vict. c. 47, s. 2.

(*r*) Co. Litt. 344 b; *Anon.*, 1 Vern. 318; *Hiern v. Mill*, 13 Ves. 120; 3 Prest. Abst. 354; *Bellamy v. Sabine*, 1 De Gex & Jones, 566.

(*x*) Stat. 45 & 46 Vict. c. 39, s. 2, and rule thereunder; Williams's Conveyancing Statutes, 262—274, 479—488.

writs of exemption, *lis pendens*, &c.

Certificate.

Supreme Court, at the instance of purchasers and others, for entries of judgments, writs of execution, *lis pendens* and other matters, whereof entries are required or allowed to be made in that office by any statute (*y*); and for making a certificate of the result of any such search. And it is enacted (*z*) that, in favour of a purchaser (*a*), as against persons interested under or in respect of judgments or other matters, whereof entries are required or allowed to be made as aforesaid, the certificate, according to the tenour thereof, shall be conclusive, affirmatively or negatively, as the case may be. These provisions of this Act, which every intending practitioner should read, are contained and discussed in the editor's "Conveyancing Statutes"

Bankruptcy.

Another instance of involuntary alienation for the payment of debts, occurs on the bankruptcy of any person, in which event the whole of his freehold, as well as his personal estate, is now vested in the creditor's trustee, by virtue of his appointment, in trust for the whole body of the creditors (*c*).

Insolvency.

On the insolvency of any person his whole estate formerly vested in the provisional assignee of the Court for the Relief of Insolvent Debtors, from whom it was transferred to assignees appointed by the Court, vesting in them by virtue of their appointment, and without any conveyance, in trust for the benefit of the creditors of the insolvent, according to the provisions of the Act for amending the laws for the relief of insolvent debtors (*d*). The whole of these laws were however repealed in the

(*y*) Williams's Conveyancing Statutes, 263—270.

subsect. 4 (ii).

Page 261 et seq.

(*z*) Stat. 45 & 46 Vict. c. 39, s. 2, subsect. 3.

(*c*) Stat. 46 & 47 Vict. c. 52, ss. 20, 44, 54, 168; see Williams on Personal Property, 224, 232—234, 12th ed.

(*a*) In this Act purchaser includes a lessee or mortgagee, or an intending purchaser, lessee, or mortgagee, or other person, who, for valuable consideration, takes or deals with property; sect. 1,

(*d*) 1 & 2 Vict. c. 110, s. 23 et seq. See also 5 & 6 Vict. c. 116; 7 & 8 Vict. c. 96; 10 & 11 Vict. c. 102.

year 1869, and all debtors, whether traders or not, are now subject to the law of bankruptcy (*c*).

So inherent is the right of alienation of all estates (except estates tail, in which, as we have seen, the right is only of a modified nature), that it is impossible for any owner, by any means, to divest himself of this right. And in the same manner the liability of estates to involuntary alienation for payment of debts cannot by any means be got rid of. So long as any estate is in the hands of any person, so long does his power of disposition continue (*f*), and so long also continues his liability to have the estate taken from him to satisfy the demands of his creditors (*g*). When, however, lands or property are given by one person for the benefit of another, it is possible to confine the duration of the gift within the period in which it can be personally enjoyed by the grantee. Thus land, or any other property, may be given to trustees in trust for A. until he shall dispose of the same, or shall become bankrupt, or until any act or event shall occur, whereby the property might belong to any other person or persons (*h*); and this is frequently done. On the bankruptcy of A., or on his attempting to make any disposition of the property, it will in such a case not vest in the trustee for his creditors, or follow the intended disposition; but the interest which had been given to A. will thenceforth entirely cease; in the same manner as where lands are given to a person for life, his interest terminates on his decease. But, although another person may make such a gift for A.'s benefit, A. would not be allowed to

The right and liability to alienation, both voluntary and involuntary, are inherent in property.

But a gift of the period of the grantee's enjoyment.

(*c*) See the chapter on Bankruptcy in the author's "Principles of the Law of Personal Property," pp. 196—198, 12th ed. (by the present editor).

(*f*) Litt. s. 360; Co. Litt. 206 b, 223 a.

(*g*) *Brandon v. Robinson*, 18 Ves. 429, 433.

(*h*) *Lockyer v. Savage*, 2 Str. 947.

Exception.

make such a disposition of his own property in trust for himself (*i*). An exception to this rule of law occurs in the case of a woman, who is permitted to have property settled upon her in such a way, that she cannot when married make any disposition of it during the coverture or marriage; but this mode of settlement is of comparatively modern date (*k*). There are also certain cases in which the personal enjoyment of property is essential to the performance of certain public duties, and in which no alienation of such property can be made; thus a benefice with cure of souls cannot be directly charged or encumbered (*l*); although a sequestration of the profits of a benefice may be obtained in execution of a judgment against (*m*), or on the bankruptcy (*n*) of, a beneficed clergyman. So offices concerning the administration of justice, and pensions and salaries given by the state for the support of the grantee in the performance of present or future duties, cannot be aliened (*o*); though pensions for past services are, generally speaking, not within the rule (*p*). But, in case of bank-

(*i*) *Lester v. Garland*, 5 Sim. 205; *Phipps v. Lord Ennismore*, 4 Russ. 131. See, however, as to a restriction on a man's own alienation, the case of *Brooke v. Pearson*, 27 Beav. 181.

(*k*) *Brandon v. Robinson*, 18 Ves. 434; *Tullett v. Armstrong*, 1 Beav. 1; 4 M. & Cr. 390; *Scarborough v. Borman*, 1 Beav. 34; 4 M. & Cr. 377; stat. 45 & 46 Vict. c. 75, s. 19; Williams on Personal Property, 585—587, 596, 12th ed.

(*l*) Stats. 13 Eliz. c. 20; 57 Geo. III. c. 99, s. 1; 1 & 2 Vict. c. 106, s. 1; *Shaw v. Pritchard*, 10 Barn. & Cress. 241; *Long v. Storie*, 3 De Gex & Smale, 308; *Hawkins v. Gathercole*, 6 De Gex, M. & G. 1.

(*m*) 3 Black. Com. 418; Rules of the Supreme Court, 1883, Order XLIII. rr. 3—5, Appendix H., No. 7.

(*n*) Stat. 46 & 47 Vict. c. 52, s. 52; see Williams on Personal Property, 238, 288, 12th ed.

(*o*) *Flarty v. Odum*, 3 T. Rep. 681; *Lidderdale v. Duke of Montrose*, 4 T. R. 248; *Wells v. Foster*, 8 M. & W. 149; stats. 5 & 6 Edw. VI. c. 16; 49 Geo. III. c. 126.

(*p*) *M'Carthy v. Goold*, 1 Ball & Beatty, 387; *Tunstal v. Boothby*, 10 Sim. 542; *Willcock v. Terrell*, 3 Ex. D. 323, 334. But see stats. 47 Geo. III. sess. 2, c. 25, s. 4, and 28 & 29 Vict. c. 73, ss. 4, 5; *Lloyd v. Cheetham*, 3 Giff. 171; *Heald v. Hay*, 3 Giff. 467.

ruptcy, the whole or part of the income arising from any office or pension of the bankrupt may be ordered to be paid to the trustee for division amongst the creditors (q).

In addition to the interests which may be created by alienation, either voluntary or involuntary, there are certain rights conferred by law on husbands and wives in each other's lands, by means of which the descent of an estate, from an ancestor to his heir, may partially be defeated. These rights will be the subject of a future chapter. If, however, the tenant in fee simple should not have disposed of his estate in his lifetime, or by his will, and if it should not be swallowed up by his debts, his lands will descend (subject to any rights of his wife) to the heir at law. The heir, as we have before observed (r), is a person appointed by the law. He is called into existence by his ancestor's decease, for no man during his lifetime can have an heir. *Nemo est heres viventis*. A man may have an *heir apparent*, or an *heir presumptive*, but until his decease he has no heir. The *heir apparent* is the person, who, if he survive the ancestor, must certainly be his heir, as the eldest son in the lifetime of his father. The *heir presumptive* is the person, who, though not certain to be heir at all events, should he survive, would yet be the heir in case of the ancestor's immediate decease. Thus an only daughter is the heiress presumptive of her father: if he were now to die, she would at once be his heir; but she is not certain of being heir; for her father may have a son, who would supplant her, and become heir apparent during the father's lifetime, and his heir after his decease. An heir at law is the only person in whom the

Husbands
and wives.

The heir at
law.

Heir ap-
parent.

Heir pro-
sumptive.

(q) Stat. 46 & 47 Vict. c. 52, s. 53; see Williams on Personal Property, 239, 288, 12th ed.; *Ex parte Huggins*, 21 Ch. D. 85.
(r) Ante, p. 87.

The heir can-
not disclaim.

Gradual pro-
gress of the
law of
descents.

law of England vests property, whether he will or not. If I make a conveyance of land to a person in my lifetime, or leave him any property by my will, he may, if he pleases, disclaim taking it, and in such case it will not vest in him against his will (*s*). But an heir at law, immediately on the decease of his ancestor, becomes presumptively possessed, or seised in law, of all his lands (*t*). No disclaimer that he may make will have any effect, though, of course, he may, as soon as he pleases, dispose of the property by an ordinary conveyance. A title as heir at law is not nearly so frequent now as it was in the times when the right of alienation was more restricted. And when it does occur it is often established with difficulty. This difficulty arises more from the nature of the facts to be proved, than from any uncertainty in the law. For the rules of descent have now attained an almost mathematical accuracy, so that, if the facts are rightly given, the heir at law can at once be pointed out. The accuracy of the law has arisen by degrees, by the successive determination of disputed points. Thus, in the time of Henry II., soon after feudal tenures had become established in England (*u*), an estate of inheritance held by military tenure descended first to the former tenant's eldest or only son; whilst an inheritance held in socage tenure (of which we shall speak hereafter) was divisible amongst all the sons, or passed to the eldest or youngest son, according to the course of descent dictated by ancient custom. In default of sons, all the daughters succeeded in equal shares. If the late tenant had left no children, the descendants of children (*x*) were the next heirs. In default of lineal descendants, the brothers and sisters came in; and if they were dead, their children; then the uncles and

(*s*) *Nicolson v. Wordsworth*, 2 26 (4th ed. 34).
Swanst. 365, 372.

(*u*) See note (*q*) to p. 5, ante.

(*t*) *Watkins on Descents*, '25, (x) *Glanvil*, lib. 7, c. 3.

their children; and then the aunts and their children; males being always preferred to females (*y*). Subsequently, about the time of Henry III. (*z*), the old Saxon rule, which divided the inheritance equally amongst all males of the same degree, and which had hitherto prevailed as to all lands not actually the subjects of feudal tenure (*a*), gave place to the feudal law, introduced by the Normans, of descent to the eldest son or eldest brother; though among females the estate was still equally divided, as it is at present. And, about the same time, all descendants *in infinitum* of any person, who would have been heir if living, were allowed to inherit by right of representation. Thus, if the eldest son died in the lifetime of his father, and left issue, *that* issue, though a grandson or granddaughter only, was to be preferred in inheritance before any younger son (*b*). The father, moreover, or any other lineal ancestor, was never allowed to succeed as heir to his son or other descendant; neither were kindred of the half-blood admitted to inherit (*c*). The rules of descent, thus gradually fixed, long remained unaltered. Lord Hale, in whose time they had continued the same for above 400 years, was the first to reduce them to a series of canons (*d*); which were afterwards admirably explained and illustrated by Blackstone, in his well-known Commentaries; nor was any alteration made till the enactment of the Act for the amendment of the law of inheritance (*e*), A.D. 1833. By this Act, amongst other important alterations, the father is heir to his son, supposing the latter to leave no issue; and all lineal

(*y*) 1 Reeves's Hist. Eng. Law, 43.

(*z*) 1 Reeves's Hist. 310; 2 Black. Com. 215; Co. Litt. 191 a, note (1), vi. 4.

(*a*) *Clements v. Sandaman*, 1 P. Wms. 64; 2 Lord Raymond, 1024; 1 Scriv. Cop. 53.

(*b*) 1 Reeves's Hist. 310.

(*c*) 2 Black. Com. c. 14.

(*d*) Hale's Hist. Com. Law, 6th ed., p. 318 et seq.

(*e*) Stat. 3 & 4 Will. IV. c. 106, amended by stat. 22 & 23 Vict. c. 35, ss. 19, 20.

ancestors are rendered capable of being heirs (*f*); relations of the half-blood are also admitted to succeed, though only on failure of relations in the same degree of the whole blood (*g*). The Act has, moreover, settled a doubtful point in the law of descent to distant heirs. The rules of descent, as modified by this Act, will be found at large in the next chapter.

(*f*) Stat. 3 & 4 Will. IV. c. 106, s. 6.

(*g*) Sect. 9.

CHAPTER IV.

OF THE DESCENT OF AN ESTATE IN FEE SIMPLE.

WE shall now proceed to consider the rules of the de- Rules of
 scent of an estate in fee simple, as altered by the Act descent.
 for the amendment of the law of inheritance (*a*). This
 Act does not extend to any descent on the decease of any
 person, who may have died before the first of January,
 1834 (*b*). For the rules of descent prior to that date,
 the reader is referred to the Commentaries of Black-
 stone (*c*), to Watkins's Essay on the Law of Descents,
 and to the author's Lectures on Seisin, pp. 51—69.

1. The first rule of descent now is, that inheritances Rule 1.
 shall lineally descend, in the first place, to the issue of
 the last purchaser *in infinitum*. The word *purchase* Purchase.
 has in law a meaning more extended than its ordinary
 sense: it is possession to which a man cometh not by
 title of descent (*d*): a devisee under a will is accord-
 ingly a purchaser in law. And, by the Act, the pur-
 chaser from whom descent is to be traced is defined to
 be the last person who had a right to the land, and
 who cannot be proved to have acquired the land by
 descent, or by certain means (*e*) which render the land
 part of, or descendible in the same manner as, other
 land acquired by descent. This rule is an alteration
 of the old law, which was, that descent should be traced
 from the person who last had the feudal possession or
 Descent for-
 merly traced
 from the per-

(*a*) Stat. 3 & 4 Will. IV. c. 106,
 amended by stat. 22 & 23 Vict.
 c. 35, ss. 19, 20.

(*b*) Sect. 11.

(*c*) 2 Black. Com. c. 14.

(*d*) Litt. s. 12.

(*e*) Escheat, Partition and In-
 closure, s. 1.

Objection to
the alteration.

seisin, as it was called; the maxim being *seisina facit stipitem* (*f*). This maxim, a relict of the troublesome times when right without possession was worth but little, sometimes gave occasion to difficulties, owing to the uncertainty of the question, whether possession had or had not been taken by any person entitled as heir; thus, where a man was entering into a house by the window, and when half out and half in, was pulled out again by the heels, it was made a question, whether or not this entry was sufficient, and it was adjudged that it was (*g*). These difficulties cannot arise under the new Act; for now the heir to be sought for is not the heir of the person *last possessed*, but the heir of the *last person entitled who did not inherit*, whether he did or did not obtain the possession, or the receipt of the rents and profits of the land. The rule, as altered, is not indeed altogether free from objection; for it will be observed that, not content with making a title to the land equivalent to possession, the Act has added a new term to the definition, by directing descent to be traced from the last person entitled *who did not inherit*. So that if a person who has become entitled as heir to another should die intestate, the heir to be sought for is not the heir of such last owner, but the heir of the person from whom such last owner inherited. This provision, though made by an Act consequent on the report of the Real Property Commissioners, was not proposed by them. The Commissioners merely proposed that lands should pass to the heir of the *person last entitled* (*h*), instead, as before, of the *person last possessed*; thus facilitating the discovery of the heir, by rendering a mere title to the lands sufficient to make the person entitled the stock of descent, without his obtaining the feudal possession, as before required. Under the old law, descent was

(*f*) 2 Black. Com. 209; Watk. ed. 53).

Descent, c. 1, s. 2.

(*h*) Thirteenth proposal as to

(*g*) Watk. Descent, 45 (4th Descents.

confined within the limits of the family of the *purchaser*; but now no person who can be shown to have inherited can be the stock of descent, except in the case of the total failure of the heirs of the purchaser (*i*); in every other case, descent must be traced from the last *purchaser*. The author is bound to state that the decision of the Courts of Exchequer and the Exchequer Chamber, in the recent case of *Muggleton v. Barnett* (*k*), is opposed to this view of the construction of the statute. The reasons which have induced the author to think that decision erroneous will be found in Appendix A.

2. The second rule is, that the male issue shall be Rule 2. admitted before the female (*l*).

3. The third rule is, that where two or more of the Rule 3. male issue are in equal degree of consanguinity to the purchaser, the eldest only shall inherit; but the females shall inherit altogether (*m*). The last two rules are the same now as before the recent Act; accordingly, if a man has two sons, William and John, and two daughters, Susannah and Catherine (*n*), William, the eldest son, is the heir at law, in exclusion of his younger brother John, according to the third rule, and of his sisters, Susannah and Catherine, according to rule 2, although such sisters should be his seniors in years. If, however, William should die without issue, then John will succeed, by the second rule, in exclusion of his sisters; but if John also should die without issue, the two sisters will succeed in equal shares by the third rule as being together heir to their father.

Primogeniture, or the right of the eldest among the males to inherit, was a matter of far greater conse- Primo-
geniture.

(*i*) Stat. 22 & 23 Vict. c. 35,
ss. 19, 20.

(*k*) 1 H. & N. 282; 2 H. & N.
653.

(*l*) 2 Black. Com. 212.

(*m*) 2 Black. Com. 214.

(*n*) See the Table of Descents
annexed.

quence in ancient times, before alienation by will was permitted, than it is at present. Its feudal origin is undisputed; but in this country it appears to have taken deeper root than elsewhere; for a total exclusion of the younger sons appears to be peculiar to England: in other countries, some portion of the inheritance, or some charge upon it, is, in many cases at least, secured by law to the younger sons (*o*). From this ancient right has arisen the modern English custom of settling the family estates on the eldest son; but the right and the custom are quite distinct: the right may be prevented by the owner making his will; and a conformity to the custom is entirely at his option.

Coparceners.

When two or more persons together form an heir, they are called in law *coparceners*, or, more shortly, *parceners* (*p*). The term is derived, according to Littleton (*q*), from the circumstance that the law will constrain them to make partition; that is, any one may oblige all the others so to do. Whatever may be thought of this derivation, it will serve to remind the reader that coparceners are the only kind of joint owners to whom the ancient common law granted the power of severing their estates without mutual consent: as the estate in coparcenary was cast on them by the act of the law, and not by their own agreement, it was thought right that the perverseness of one should not prevent the others from obtaining a more beneficial method of enjoying the property. This compulsory partition was formerly effected by a writ of partition (*r*), a proceeding now abolished (*s*). The modern method is by an action for partition in the Chancery Division of the High Court; when partition is made by the judge in Chambers, or more rarely by a commission

Partition.

(*o*) Co. Litt. 191 a, n. (1), vi. 4.

(*p*) Bac. Abr. tit. Coparceners.

(*q*) Sect. 241; 2 Black. Com. 189.

(*r*) Litt. ss. 247, 248.

(*s*) Stat. 3 & 4 Will. IV. c. 27

s. 36.

issued for the purpose by the Court (*t*). Partition, however, is most frequently made by voluntary agreement between the parties, and for this purpose a deed has, by a modern Act of Parliament, been rendered essential in every case (*u*). The land commissioners for England have also power to effect partitions, by virtue of modern enactments which will be found mentioned at the end of the chapter on Joint Tenants and Tenants in Common. When partition has been effected, the lands allotted are said to be held in *severalty*; and each owner is said to have the *entirety* of her own parcel. After partition, the several parcels of land descend in the same manner as the undivided shares, for which they have been substituted (*v*); the coparceners, therefore, do not by partition become *purchasers*, but still continue to be entitled by descent. The term *coparceners* is not applied to any other joint owners, but only to those who have become entitled as coheirs (*w*).

4. The fourth rule is, that all the lineal descendants *in infinitum* of any person deceased shall represent their ancestor; that is, shall stand in the same place as the person himself would have done had he been living (*x*). Thus, in the case above mentioned, on the death of William the eldest son, leaving a son, that son would succeed to the whole by right of representation, in exclusion of his uncle John, and of his two aunts Susannah and Catherine; or had William left a son and daughter, such daughter would, after the decease of her brother without issue, be, in like manner, the heir of her grandfather, in exclusion of her uncle and aunts.

(*t*) Co. Litt. 169 a, n. (2); 1 Fonb. Eq. 18; *Canning v. Canning*, 2 Drewry, 434; stat. 36 & 37 Vict. c. 66, s. 34, subsect. (3); Seton on Decrees, 1012—1030, 4th ed.

(*u*) Stat. 8 & 9 Vict. c. 106, s. 3,

W.R.P.

repealing stat. 7 & 8 Vict. c. 76, s. 3, to the same effect.

(*v*) 2 Prest. Abst. 72; *Doe d. Crosthwaite v. Dixon*, 5 Adol. & Ellis, 834.

(*w*) Litt. s. 254.

(*x*) 2 Black. Com. 216.

Descent of an
estate tail.

The preceding rules of descent apply as well to the descent of an estate tail, if not duly barred, as to that of an estate in fee simple. The descent of an estate tail is always traced from the purchaser, or donee in tail, that is, from the person to whom the estate tail was at first given. This was the case before the Act, as well as now (y); for, the person who claims an entailed estate as heir claims only according to the express terms of the gift, or, as it is said, *per formam doni*. The gift is made to the donee, or purchaser, and the heirs of his body; all persons, therefore, who can become entitled to the estate by descent, must answer the description of heirs of the purchaser's body; in other words, must be *his* lineal heirs. The second and third rules also equally apply to estates tail, unless the restriction of the descent to heirs male or female should render unnecessary the second, and either clause of the third rule. The fourth rule completes the canon, so far as estates tail are concerned; for, when the issue of the donee are exhausted, such an estate must necessarily determine. But the descent of an estate in fee simple may extend to many other persons, and accordingly requires for its guidance additional rules, with which we now proceed.

Rule 5.

5. The fifth rule is, that on failure of lineal descendants, or issue of the purchaser, the inheritance shall descend to his nearest lineal ancestor. This rule is materially different from the rule which prevailed before the passing of the Act. The former rule was, that, on failure of lineal descendants or issue of the person last seised (or feudally possessed), the inheritance should descend to his *collateral* relations, being of the blood of the first purchaser, subject to the three preceding rules (z). The old law never allowed lineal relations

The old rule.

(y) *Doe d. Gregory v. Whichelo*,
8 T. Rep. 211.

(z) 2 Black. Com. 220.

in the ascending line (that is, parents or ancestors) to succeed as heirs. But, by the new Act, descent is to be traced through the ancestor, who is to be heir in preference to any person who would have been entitled to inherit, either by tracing his descent through such lineal ancestor, or in consequence of there being no descendant of such lineal ancestor. The exclusion of parents and other lineal ancestors from inheriting under the old law was a hardship of which it is not easy to see the propriety; nor is the explanation usually given of the origin perhaps quite satisfactory. Bracton, who is followed by Lord Coke, compares the descent of an inheritance to that of a falling body, which never goes upwards in its course (a). The modern explanation derives the origin of collateral heirships, in exclusion of lineal ancestors, from gifts of estates (at the time when inheritances were descendible only to issue or lineal heirs) made, by the terms of the gift, to be descendible to the heirs of the donee, in the same manner as an ancient inheritance would have descended. This was called a gift of a *feudum novum*, or new inheritance, to hold *ut feudum antiquum*, as an ancient one. Now, an ancient inheritance,—one derived in a course of descent from some remote lineal ancestor,—would of course be descendible to all the issue or *lineal* heirs of such ancestor, including, after the lapse of many years, numerous families, all *collaterally* related to one another: an estate newly granted, to be descendible *ut feudum antiquum*, would therefore be capable of descending to the collateral relations of the grantee, in the same manner as a really ancient inheritance, descended to him, would have done. But an ancient inheritance could never go to the father of any owner, because it must have come from his father to him, and the father must have died before the son could inherit: in grants of inheritances to be descendible

Exclusion of
lineal ances-
tors.

*Feudum
novum ut
,*

(a) Bract. lib. 2, c. 29; Co. Litt. 11 a.

as ancient ones, it followed, therefore, that the father or any lineal ancestor could never inherit (*b*). So far, therefore, the explanation holds; but it is not consistent with every circumstance; for an elder brother has always been allowed to succeed as heir to his younger brother, contrary to this theory of an ancient lineal inheritance, which would have previously passed by every elder brother, as well as the father. The explanation of the origin of a rule, though ever so clear, is however a different thing from a valid reason for its continuance; and, at length, the propriety of placing the property of a family under the care of its head, is now perceived and acted on; and the father is heir to each of his children, who may die intestate, and without issue, as is more clearly pointed out by the next rule.

Rule 6.

Preference of
males to
females.

6. The sixth rule is, that the father and all the male paternal ancestors of the purchaser, and their descendants, shall be admitted, before any of the female paternal ancestors or their heirs; all the female paternal ancestors and their heirs, before the mother or any of the maternal ancestors, or her or their descendants; and the mother and all the male maternal ancestors, and her and their descendants, before any of the female maternal ancestors, or their heirs (*c*). This rule is a development of the ancient canon, which requires that, in collateral inheritances, the male stocks should always be preferred to the female; and it is analogous to the second rule above given, which directs that in lineal inheritances the male issue shall be admitted before the female. This strict and careful preference of the male to the female line was in full accordance with the spirit of the feudal system, which, being essentially military

(*b*) 2 Black. Com. 212, 221, 222; Wright's Tenures, 180. See also Co. Litt. 11 a, n. (1).

(*c*) Stat. 3 & 4 Will. IV. c. 106, s. 7, combined with the definition of "descendants," s. 1.

in its nature, imposed obligations by no means easy for a female to fulfil; and those who were unable to perform the services could not expect to enjoy the benefits (*d*). The feudal origin of our laws of descent will not, however, afford a complete explanation of this preference; for such lands as continued descendible after the Saxon custom of equal division, and not according to the Norman and feudal law of primogeniture, were equally subject to the preference of males to females, and descended in the first place exclusively to the sons, who divided the inheritance between them, leaving nothing at all to their sisters. The true reason of the preference appears to lie in the degraded position in society, which, in ancient times, was held by females; a position arising from their deficiency in that kind of might, which then too frequently made the right. The rights given by the common law to a husband over his wife's property (rights in modern times generally controlled by proper settlements previous to marriage, and now abolished) show the state of dependence to which, in ancient times, women must have been reduced (*e*). The preference of males to females has been left untouched by the recent Act for the amendment of the law of descents; and the father and all his most distant relatives have priority over the mother of the purchaser: she cannot succeed as his heir until all the paternal ancestors of the purchaser, both male and female, and their respective families, have been exhausted. The father, as the nearest male lineal ancestor, of course stands first, supposing the issue of the purchaser to have failed. If the father should be dead, his eldest son, being the brother of the purchaser, will succeed as heir in the place of his father, according to the fourth rule;

Preference of
males to
females still
continued.

(*d*) 2 Black. Com. 214.

(*e*) See post, the chapter on
Husband and Wife; Williams on

Personal Property, 570—574, 595,
596, 12th ed.

unless he be of the half blood to the purchaser, which case is provided for by the next rule, which is :—

Rule 7.

could not
inherit.

7. That a kinsman of the half blood shall be capable of being heir ; and that such kinsman shall inherit next after a kinsman in the same degree of the whole blood, and after the issue of such kinsman when the common ancestor is a male (*f*), and next after the common ancestor, when such ancestor is a female. This introduction of the half blood is also a new regulation ; and, like the introduction of the father and other lineal ancestors, it is certainly an improvement on the old law, which had no other reason in its favour than the feudal maxims, or rather fictions, on which it was founded (*g*). By the old law, a relative of the purchaser of the half blood, that is, a relative connected by one only, and not by both of the parents, or other ancestors, could not possibly be heir ; a half brother, for instance, could never enjoy that right which a cousin of the whole blood, though ever so distant, might claim in his proper turn. The exclusion of the half blood was accounted for in a manner similar to that by which the exclusion of all lineal ancestors was explained ; but a return to practical justice may well compensate a breach in a beautiful theory. Relatives of the half blood now take their proper and natural place in the order of descent. The position of the half blood next after the common ancestor, when such ancestor is a female, is rather a result of the sixth rule, than an additional independent regulation, as will appear hereafter.

8. The eighth rule is, that in the admission of female paternal ancestors, the mother of the more remote male paternal ancestor, and her heirs, shall be preferred to

(*f*) Stat. 3 & 4 Will. IV. c. 106, (*g*) 2 Black. Com. 228.
s. 9.

the mother of a less remote male paternal ancestor, and her heirs; and, in the admission of female maternal ancestors, the mother of the more remote male maternal ancestor, and her heirs, shall be preferred to the mother of a less remote male maternal ancestor, and her heirs (*h*). The eighth rule is a settlement of a point in distant heirships, which very seldom occurs, but which has been the subject of a vast deal of learned controversy. The opinion of Blackstone (*i*) and Watkins (*j*) is now declared to be the law.

9. A further rule of descent has now been introduced Rule 9. by a recent statute (*k*), which enacts that, where there shall be a total failure of heirs of the purchaser, or where any land shall be descendible as if an ancestor had been the purchaser thereof, and there shall be a total failure of the heirs of such ancestor, then and in every such case the land shall descend, and the descent shall thenceforth be traced, from the person last entitled to the land, as if he had been the purchaser thereof. This enactment provides for such a case as the following. A purchaser of lands may die intestate, leaving an only son and no other relations. On the death of the son intestate there will be a total failure of the heirs of the purchaser; and previously to this enactment the land would have escheated to the lord of the fee, as explained in the next chapter. But now, although there be no relations of the son on his father's side, yet he may have relations on the part of his mother, or his mother may herself be living: and these persons, who were before totally excluded, are now admitted in the order mentioned in the sixth rule.

(*h*) Stat. 3 & 4 Will. IV. c. 106, s. 8. See *Greaves v. Greenwood*, 24 W. R. 926; 45 L. J., Ex. Div. 795; affirmed by Court of Appeal, L. R., 2 Ex. Div. 289.

(*i*) 2 Black. Com. 238.

(*j*) Watkins on Descents, 130 (146 et seq. 4th ed.).

(*k*) Stat. 22 & 23 Vict. c. 35, ss. 19, 20.

Explanation
of the table.

Descent to the
sons and their
issue.

The rules of descent above given will be better apprehended by a reference to the accompanying table, taken, with a little modification, from Mr. Watkins's Essay on the Law of Descents. In this table, Benjamin Brown is the purchaser, from whom the descent is to be traced. On his death intestate, the lands will accordingly descend first to his eldest son, by Ann Lee, William Brown; and from him (2ndly) to *his* eldest son, by Sarah Watts, Isaac Brown. Isaac dying without issue we must now seek the heir of the *purchaser*, and not the heir of Isaac. William, the eldest son of the purchaser, is dead; but William may have had other descendants, besides Isaac his eldest son; and, by the fourth rule, all the lineal descendants *in infinitum* of every person deceased shall represent their ancestor. We find accordingly that William had a daughter Lucy by his first wife, and also a second son, George, by Mary Wood, his second wife. But the son George, though younger than his half sister Lucy, yet being a male, shall be preferred according to the second rule; and he is therefore (3rdly) the next heir. Had Isaac been the purchaser, the case would have been different; for, his half brother George would then have been postponed, in favour of his sister Lucy of the whole blood, according to the seventh rule. But now Benjamin is the purchaser, and both Isaac and George are equally his grandchildren. George dying without issue, we must again seek the heir of his grandfather Benjamin, who now is undeniably (4thly) Lucy, she being the remaining descendant of his eldest son. Lucy dying likewise without issue, her father's issue become extinct; and we must still inquire for the heir of Benjamin Brown the purchaser, whom we now find to be (5thly) John Brown, his only son by his second wife. The land then descends from John to (6thly) *his* eldest son Edmund, and from Edmund (7thly) to his only son James. James dying without issue, we must once

more seek the heir of the purchaser, whom we find among the yet living issue of John. John leaving a daughter by his first wife, and a son and a daughter by his second wife, the lands descend (8thly) to Henry his son by Frances Wilson, as being of the male sex; but he dying without issue, we again seek the heir of Benjamin, and find that John left two daughters, but by different wives; these daughters, being in the same degree and both equally the children of their common father whom they represent, shall succeed (9thly) in equal shares. One of these daughters dying without issue in the lifetime of the other, the other shall then succeed to the whole as the only issue of her father. But the surviving sister dying also without issue, we still pursue our old inquiry, and seek again for the heir of Benjamin Brown the purchaser.

The issue of the sons of the purchaser is now extinct; and, as he left two daughters, Susannah and Catherine, by different wives, we shall find, by the second and third rules, that they next inherit (10thly) in equal shares as heirs to him. Catherine Brown, one of the daughters, now marries Charles Smith, and dies, in the lifetime of her sister Susannah, leaving one son John. The half share of Catherine must then descend to the next heir of her father Benjamin, the purchaser. The next heirs of Benjamin Brown, after the decease of Catherine, are evidently Susannah Brown and John Smith, the son of Catherine. And in the first edition of the present work it was stated that the half share of Catherine would, on her decease, descend to them. This opinion has been very generally entertained (1). On further research, however, the author inclined to the opinion that the share of Catherine would, on her decease, descend entirely to her son (11thly) by right

Descent to the daughter and their issue.

(1) 23 Law Mag. 279; 1 Hayes's wood's Conveyancing, by Sweet, Conv. 313; 1 Jarman & Bythe- 139. .

of representation; and that, as respects his mother's share, he and he only is the right heir of the purchaser. The reasoning which led the author to this conclusion will be found in the Appendix (*m*). This point is now established by judicial decision (*n*).

Descent to the father of the purchaser, and his issue.

If Susannah Brown and John Smith should die without issue, the descendants of the purchaser will then have become extinct; and Joseph Brown, the father of the purchaser, will then (12thly), if living, be his heir by the fifth and sixth rules. Bridget, the sister of the purchaser, then succeeds (13thly), as representing her father, in preference to her half brother Timothy, who is only of the half blood to the purchaser, and is accordingly postponed to his sister by the seventh rule. But next to Bridget is Timothy (14thly) by the same rule, Bridget being supposed to leave no issue.

Descent to the the purchaser and their issue.

On the decease of Timothy without issue, all the descendants of the father will have failed, and the inheritance will next pass to Philip Brown (15thly), the paternal grandfather of the purchaser. But the grandfather being dead, we must next exhaust his issue, who stand in his place, and we find that he had another son, Thomas (16thly), who accordingly is the next heir; and, on his decease without issue, Stephen Brown (17thly), though of the half blood to the purchaser, will inherit, by the seventh rule, next after Thomas, a kinsman in the same degree of the whole blood. Stephen Brown dying without issue, the descendants of the grandfather are exhausted; and we must accordingly still keep, according to the sixth rule, in the male paternal line, and seek the paternal great grandfather

(*m*) See Appendix (B.).

(*n*) *Cooper v. France*, V.-C. E., 14 Jur. 214; 19 Law Journ. (N. S.) Chancery, 313; *Lewin v.*

Lewin, C. P., 21 Nov. 1874, stated in the Author's Lectures on the Seisin of the Freehold, Lecture VI., p. 81.

of the purchaser, who is (18thly) Robert Brown; and who is represented, on his decease, by (19thly) Daniel Brown, his son. After Daniel and his issue follow, by the same rule, Edward (20thly) and his issue (21stly) Abraham.

All the male paternal ancestors of the purchaser, and their descendants, are now supposed to have failed; and by the sixth rule, the female paternal ancestors and their heirs are next admitted. By the eighth rule, in the admission of the female paternal ancestors, the mother of the more remote male paternal ancestor, and her heirs, shall be preferred to the mother of a less remote male paternal ancestor and her heirs. Barbara Finch (22ndly), and her heirs, have therefore priority both over Margaret Pain and her heirs, and Esther Pitt and her heirs; Barbara Finch being the mother of a more remote male paternal ancestor than either Margaret Pain or Esther Pitt. Barbara Finch being dead, her heirs succeed her; *she* therefore must now be regarded as the stock of descent, and her heirs will be the right heirs of Benjamin Brown the purchaser. In seeking for her heirs inquiry must first be made for her issue; now her issue by Edward Brown has already been exhausted in seeking for his descendants; but she might have had issue by another husband; and such issue (23rdly) will accordingly next succeed. These issue are evidently of the half blood to the purchaser. But they are the right heirs of Barbara Finch; and they are accordingly entitled to succeed next after her, without the aid they might derive from the position expressly assigned to them by the seventh rule. The common ancestor of the purchaser and of the issue is Barbara Finch, a female; and, by the united operation of the other rules, these issue of the half blood succeed next after the common ancestor. The latter part of the seventh rule is, therefore, explanatory only, and not

Descent to the female paternal ancestors and their heirs.

Half blood to the purchaser where the common ancestor is a female.

absolutely necessary (*o*). In default of issue of Barbara Finch, the lands will descend to her father Isaac Finch (24thly), and then to his issue (25thly), as representing him. If neither Barbara Finch, nor any of her heirs, can be found, Margaret Pain (26thly), or her heirs, will be next entitled, Margaret Pain being the mother of a more remote male paternal ancestor than Esther Pitt; but next to Margaret Pain and her heirs will be Esther Pitt (27thly), or her heirs, thus closing the list of female paternal ancestors.

Descent to the
mother of the
and
the maternal
ancestors.

Next to the female paternal ancestors and their heirs comes the mother of the purchaser, Elizabeth Webb, (28thly) (supposing her to be alive), with respect to whom the same process is to be pursued as has before been gone over with respect to Joseph Brown, the purchaser's father. On her death, her issue by John Jones (29thly) will accordingly next succeed, as representing her, by the fourth rule, agreeably to the declaration as to the place of the half blood contained in the seventh rule. Such issue becoming extinct, the nearest male maternal ancestor is the purchaser's maternal grandfather, William Webb (30thly), whose issue (31stly) will be entitled to succeed him. Such issue failing, the whole line of male maternal ancestors and their descendants must be exhausted, by the sixth rule, before any of the female maternal ancestors, or their heirs, can find admission; and when the female maternal ancestors are resorted to, the mother of the more remote male maternal ancestor, and her heirs, is to be preferred, by the eighth rule, to the mother of the less remote male maternal ancestor, and her heirs. The course to be taken is, accordingly, precisely the same as in pursuing the descent through the paternal ancestors of the purchaser. In the present table, therefore, Harriet Tibbs

(*o*) See Jarman & Bythewood's Conveyancing, by Sweet, vol. i. 146, note (*a*).

(32ndly), the maternal grandmother of the purchaser, is the person next entitled, no claimants appearing whose title is preferable; and, should she be dead, her heirs will be entitled next after her. On the failure of the heirs of the purchaser, the person last entitled is, as we have seen (*p*), to be substituted in his place, and the same course of investigation is again to be pursued with respect to the person last entitled as has already been pointed out with respect to the last purchaser.

It should be carefully borne in mind, that the above-mentioned rules of descent apply exclusively to estates in land, and to that kind of property which is denominated *real*, and have no application to money or other personal estate, which is distributed on intestacy in a manner which the reader will find explained in the author's treatise on the law of personal property (*q*).

Rules of descent do not apply to personal estate.

An exception to the law of descent was made by the Land Transfer Act, 1875 (*r*), which enacted (*s*) that upon the death of a bare trustee intestate as to any corporeal or incorporeal hereditament of which such trustee was seised in fee simple, such hereditament should vest, like a chattel real, in the legal personal representative from time to time of such trustee; but this enactment did not apply to lands registered under the Land Transfer Act. A bare trustee may, perhaps, be defined as a person who has no beneficial interest in the property of which he is seised nor any active duty to perform in respect of it (*t*).

On death of a bare trustee intestate the hereditaments vested in his legal personal representative.

A bare trustee.

(*p*) Ante, p. 135.

(*q*) Page 419, 11th ed.; 557, 12th ed.

(*r*) Stat. 38 & 39 Vict. c. 87, which commenced 1st January, 1876, repealing stat. 37 & 38 Vict. c. 78, s. 5, passed 7th August, 1874, which was to the same effect, omitting the word "intestate."

See Williams's Conveyancing Statutes, 17, 18.

(*s*) Sect. 48.

(*t*) See *Christie v. Ovington*, 1 Ch. D. 279, and post, the chapter on Uses and Trusts; *Morgan v. Swansea Urban Sanitary Authority*, 9 Ch. D. 582; Williams's Conveyancing Statutes, 19, 57.

Descent of

trustee or
mortgagee.

The above enactment was repealed as to cases of death occurring after the 31st December, 1881, by the Conveyancing and Law of Property Act, 1881 (*u*). This Act provides a new rule for the descent of real estate vested in a sole trustee or mortgagee who may die after the above date. It enacts (*x*), that where an estate or interest of inheritance, or limited to the heir as special occupant, in any tenements or hereditaments, corporeal or incorporeal, is vested on any trust, or by way of mortgage, in any person solely, the same shall on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time, in like manner as if the same were a chattel real vesting in them or him (*y*).

Order for
administra-debtor's
estate.

In connection with the subject of the descent of real estate, it may be mentioned that, when an order is made under the Bankruptcy Act, 1883 (*z*), for the administration in bankruptcy of a deceased debtor's estate (*a*), the property (*b*) of the debtor vests in the official receiver of the Court (*c*) as trustee thereof, who is then empowered to realize the same by sale or otherwise, and distribute the proceeds among the creditors of the deceased (*d*).

(*u*) Stat. 44 & 45 Vict. c. 41, s. 30, sub-ss. 2, 3.

(*x*) Sect. 30, sub-ss. 1, 3.

(*y*) As to the effect of this enactment, see Williams's Conveyancing Statutes, 170—176; *Re Pilling's Trusts*, 26 Ch. D. 432.

(*z*) Stat. 46 & 47 Vict. c. 52, s. 125; Williams on Personal Property, 282—285, 12th ed.

(*a*) See ante, p. 107.

(*b*) See Williams on Personal Property, 232—234, 12th ed.

(*c*) See Ibid. 217.

(*d*) See Ibid. 239, 246, 283.

CHAPTER V.

OF THE TENURE OF AN ESTATE IN FEE SIMPLE.

THE most familiar instance of a tenure is given by a common lease of a house or land for a term of years; in this case the person letting is still called the *landlord*, and the person to whom the premises are let is the *tenant*; the terms of the tenure are according to the agreement of the parties, the rent being usually the chief item, and the rest of the terms of tenure being contained in the covenants of the lease; but, if no rent should be paid, the relation of landlord and tenant would still subsist, though of course not with the same advantage to the landlord. This, however, is not a freehold tenure; the lessee has only a chattel interest, as has been before observed (*a*); but it may serve to explain tenures of a freehold kind, which are not so familiar, though equally important. So, when a lease of lands is made to a man *for his life*, the lessee becomes tenant to the lessor (*b*), although no rent may be reserved; here again a tenure is created by the transaction, during the life of the lessee, and the terms of the tenure depend on the agreement of the parties. So, if a gift of land should be made to a man *and the heirs of his body*, the donee in tail, as he is called, and his issue, would be the tenants of the donor as long as the entail lasted (*c*), and a freehold tenure would thus be created.

But if a gift should be made to a man *and his heirs*, Fee or for an estate in fee simple, it would not now be lawful

(*a*) Ante, p. 11.

(*b*) Litt. s. 132; Gilb. Tenures, 90.

(*c*) Litt. s. 19; Kitchen on Courts, 410; Watk. Desc. p. 4, n. (*m*); pp. 11, 12 (4th ed.).

Statute of
Quia emptores.

for the parties to create a tenure between themselves, as in the case of a gift for life, or in tail. For by the statute of *Quia emptores* (*d*), we have seen that it was enacted, that from thenceforth it should be lawful for every free man to sell, at his own pleasure, his lands or tenements, or part thereof, so nevertheless that the feoffee, or purchaser, should hold the same lands or tenements of the same chief lord of the fee, and by the same services and customs as his feoffor, the seller, held them before. The giver or seller of an estate in fee simple is then himself but a tenant, with liberty of putting another in his own place. He may have under him a tenant for years, or a tenant for life, or even a tenant in tail, but he cannot now, by any kind of conveyance, place under himself a tenant of an estate in fee simple. The statute of *Quia emptores* now forbids any one from making himself the lord of such an estate; all he can do is to transfer his own tenancy; and the purchaser of an estate in fee simple must hold his estate of the same chief lord of the fee, as the seller held before him. The introduction of this doctrine of tenures has been already noticed (*e*), and it still prevails throughout the kingdom; for it is a fundamental rule, that all the lands within this realm were originally derived from the crown (either by express grant or tacit intendment of law), and therefore the Queen is sovereign lady or lady paramount, either mediate or immediate, of all and every parcel of land within the realm (*f*).

Queen is lady
paramount.

Principle in-
troduced by
William I.

As we have seen (*g*), this first principle of feudal tenure seems to have been practically introduced into English law by William the Conqueror. Under the

(*d*) 18 Edw. I. c. 1, ante, p. 85.

(*e*) Ante, pp. 2, 3, and note (*q*)
to p. 5.

(*f*) Co. Litt. 65 a, 93 a; Year
Book, M. 24 Edw. III. 65 b,
pl. 60.

Ante, note (*q*) to p. 5.

grants and re-grants of great landed estates made by him to his own followers or to the former owners, the grantees became the king's tenants *in capite* or in chief. ^{Tenants in capite.} The law of tenure thus took root in our own country, and in the course of a century developed into a complete system. We have also noticed (*h*) that the estates held directly of the king and those held of his tenants were early recognized as hereditary; and that, while the alienation of estates soon began to prevail, the form of alienation generally adopted was that of subinfeudation (*i*). By these means the estates of the tenants *in capite* were divided among various under-tenants, who again made grants of land to be held of themselves. Thus, in early times after the conquest, the rents, services and other incidents of the tenure of estates in fee simple were matters of much variety, depending as they did on the mutual agreements which, previously to the Statute of *Quia Emptores*, the various lords and tenants made with each other; though still they had their general laws, governing such cases as were not expressly provided for (*k*). The present incidents of the tenure of an estate in fee simple can only be explained by a reference to the methods of dealing with land which were in use during the two centuries next after the conquest. And in order to apprehend clearly what these dealings were, we must again advert to the early distinction between a free holding of land and a holding of land in villenage (*l*). We gather ^{The Domesday} from the Domesday survey, taken towards the end of the Conqueror's reign, that in each county large tracts of land belonged to the king or were held by his tenants *in capite*. The tenant *in capite* was sometimes an ecclesiastical corporation, such as Battle Abbey or St. Paul's Church, sometimes a great noble or other

(*h*) Ante, note (*c*) to p. 21(*i*) Ante, pp. 59(*k*) Bract. c. 19, fol. 48 b
Britton, c. 66.(*l*) See ante, p. 28.

Lord's demesne.

co-
vi.

layman. Each tract of land of the king or his tenant *in capite* is described in detail in Domesday book; and is generally found to consist of several holdings which are often called *maneria*, manors, and are sometimes spoken of as *villæ*, vills or towns. It is generally stated, with regard to each of such holdings, that there are so many *villani* (*m*), or holders of land in villenage, so many *bordarii* or *cotarii*, that is, cottiers, and so many *servi* or slaves. Sometimes the extent of the holding of the *villanus* is specified. And it is sometimes mentioned that so much land pertains to the demesne of the holder of the manor (*n*). Now it appears that the estate or holding which is in Domesday described as *manerium*, or *villa*, was a village together with a parcel of land, which was cultivated upon the common field system of husbandry by the *villani*, or members of the village community (*o*). Each *villanus* had a house and a certain quantity of arable land, which lay in scattered strips in the common fields of the vill, of which there were generally three. Besides arable land, the vill usually contained meadow land, also held in strips by the *villani*, but commonable according to the regulations of the community during certain seasons of the year (*p*). In the demesne of the holder of the *manerium* there was usually a mansion, or manor-house, for the occupation of himself or his bailiff, and a certain quantity of arable and meadow land, also in scattered strips. Sometimes the cottiers held a few strips of arable land besides their cottages. The barren lands which adjoined formed the wastes of the vill or manor, over which the cattle of the various tenants were allowed to roam in search of pasture (*q*). In early times after

(*m*) See Co. Litt. 5 b.

(*n*) See especially the survey of Middlesex; Domesday, i., 127—130.

(*o*) Seebohm, English Village Community, Ch. I.—III.; see

also Williams on Commons, 39—56, 66—70.

(*p*) See Williams on Commons, 79, 84, 90.

(*q*) In the case of *Lord Dunraven v. Llewellyn*, 15 Q. B. 791,

the conquest, the *villanus* appears to have generally held his land by performing services, which were then regarded as servile; such as ploughing the lord's land, and doing other field labour for the lord. The amount of work and payments, which could be required from a *villanus*, as his services, were regulated by custom. As time went on, the labour-service was often commuted into a money payment (*r*). Tenure in villenage was the origin of copyhold tenure, of which more hereafter (*s*). We have mentioned it here in order to point out that, at the time of the Domesday survey, the most important kind of *free holding* was a *manerium* or agricultural estate (*t*).

As the law of feudal tenure by military service grew up in England, the estates of the king's tenants *in capite* and the *maneria*, which they contained, became generally subject thereto. By grants and subinfeudation divers sub-manors and smaller estates were created, and new holdings were made by reclamation of waste lands (*u*). Thus arose the estates, which we now call **Manors**, every one of which is of a date prior to the Statute of Quia Emptores (*x*), except, perhaps, some which may have been created by the king's tenants *in capite* with licence from the crown (*y*). But, besides

the Court of Exchequer Chamber held that there was no general common law right of tenants of a manor to common on the waste. But, in the humble opinion of the author, the authorities cited by the Court, tend to the opposite conclusion. The reasons for this opinion will be found in Appendix C.

(*r*) Seebohm, *English Village Community*, Ch. II. sects. 5—12, pp. 40—81.

(*s*) Post, Part III.

(*t*) Observe also that the early leases for a life or lives granted of church lands (see ante, p. 21, n. (*c*)) were generally leases of *maneria*; see *Domesday of St. Paul's*, 122 et seq.; *Boldon Book*, *Domesday*, vol. iii. p. 565.

(*u*) See Hearne's *Liber Niger Scacarum*, vol. i.; *Hundred Rolls*, temp. Edw. I.; *Bracton*, lib. v. c. 28, fol. 434; *Fleta*, lib. iv. c. 15, § 9.

(*x*) 18 Edw. I. c. 1.

(*y*) 1 *Watk. Cop.* 15; ante, p. 85.

Liber sochemannus.

Court baron.

Socage tenure.

Houses in boroughs.
Burgenses.

the *maneria* of the great landowners and their undertenants by subinfeudation, there was another kind of *free holding*, which, at the time of the Domesday survey, was almost entirely confined to the north-eastern counties (*z*), but by the time of Edward I. is ascertained to have extended to the Midland counties (*a*); and which seems to have steadily increased and spread. This was the holding of the *liber sochemannus* or *liber tenens*, the free man, who held his land by fixed agricultural services or money rent, and was subject to the jurisdiction of the lord's court. As this class of *liberi tenentes* increased, the *free holdings* which were not manors, but merely parcels of land held of a manor, increased in number and importance. In the course of time the freeholders became the most prominent class of tenants of a manor, and the *Court baron*, the lord's Court, wherein the freeholders were both suitors and judges, became an inseparable incident of every manor (*b*). The tenure of the *liber sochemannus* became known as tenure in socage, of which we shall have more to say further on (*c*). In addition to agricultural estates and the holdings thereon, we find in Domesday a third species of *free holding*, namely, houses in cities or boroughs, held by the *burgenses*, or burgesses, generally at money rents. The law relating to this class of holding was determined by the custom of each particular borough (*d*). The

(*z*) Leicester, Lincoln, Norfolk, Northampton, Nottingham, and Suffolk; see the abstract of population given by Sir H. Ellis, *Introduction to Domesday*, vol. ii. pp. 419 et seq.; Seebohm, *English Village Community*, 86.

(*a*) See the Hundred Rolls, 7 Edw. I. (survey of Bedford, Bucks., Cambridge, Hunts. and Oxon.).

(*b*) See Co. Litt. 58 a; Kitchen on Courts Lect, vi. 6—8, 105—

115; 2 Black. Com. 90; 3 Black. Com. 33.

(*c*) See Glanvil, lib. vii. c. 3; Bracton, lib. ii. c. xxxv. fol. 77 b; Britton, lib. iii. c. 2, §§ 7—12; Litt. ss. 117—119.

(*d*) See Domesday, vol. i. pp. 1 (Dover), 100 (Exeter), 154 (Oxford), 189 (Cambridge), 262 (Chester), 280 (Nottingham and Derby), 336 (Lincoln); vol. ii. p. 104 (Colchester); Stubbs, *Select Charters*, 87—91, 110—112.

tenure of houses in ancient boroughs was afterwards known as tenure in burgage (*e*); and the customs were often highly advantageous to the holders (*f*). Such tenure was included in the class of socage tenure (*g*).

Tenure in
burgage.

Free tenure then was generally either by military or (as it was called) knight's service, or in socage (*h*); and the freeholders of land were subject to various burdens according to the nature of their tenure. In the tenure by knight's service, then the most universal and honourable species of tenure, the tenant of an estate of inheritance, that is, of an estate of fee simple or fee tail (*i*), was bound to do *homage* to his lord, kneeling to him, professing to become his man, and receiving from him a kiss (*k*). The tenant was moreover at first expected, and afterwards obliged, to render to his lord pecuniary *aids*, to ransom his person, if taken prisoner, to help him in the expense of making his eldest son a knight, and in providing a portion for the eldest daughter on her marriage. Again, on the death of a tenant, his heir was bound to pay a fine, called a *relief*, on taking to his ancestor's estate (*l*). If the heir were under age, the lord had, under the name of *wardship*, the custody of the body and lands of the heir, without account of the profits, till the age of twenty-one years in males, and sixteen in females: when the wards had a right to require possession, or sue out their *livery*, on payment to the lord of half a year's profits of their lands. In addition to this, the lord possessed the right of marriage (*maritagium*), or of disposing of his infant wards in matrimony, at their peril of forfeiting to him, in case of their refusing a suitable match, a sum of money

Incidents of
the tenure
by knight's
service.

Homage.

Aids.

Relief.

Wardship.

Livery.

Marriage.

(*e*) Glanvil, lib. xii. c. 3; Bracton, fol. 272 a; Britton, lib. iii. c. 2, § 10; Litt. ss. 162—171.

(*f*) See ante, pp. 85, 86.

(*g*) Litt. s. 162.

(*h*) Litt. s. 118.

(*i*) Litt. s. 90.

(*k*) See a description of homage, Litt. ss. 85, 86, 87; 2 Bl. Com. 53.

(*l*) Scriven on Copyholds, 738 et seq.; ante, p. 22, note.

equal to the value of the marriage: that is, what the suitor was willing to pay down to the lord as the price of marrying his ward; and double the market value was to be forfeited, if the ward presumed to marry without the lord's consent (*m*). The king's tenants *in capite* were moreover subject to many burdens and restraints, from which the tenants of other lords were exempt (*n*). Again, every lord who had two tenants or more, had a right to compel their attendance at the court baron of the manor (*o*), to which his grants to them had given existence; this attendance was called *suit of Court*, and the tenants were called free suitors (*p*). And to every species of lay tenure, as distinguished from clerical, and whether of an estate in fee simple, in tail, or for life, or otherwise, there was inseparably incident a liability for the tenant, whenever called upon, to take an oath of *fealty* or fidelity to his lord (*q*).

Suit of Court.

Fealty.

Free and common socage.

At the present day, however, a much greater similarity and uniformity will be found in the incidents of the tenure of an estate in fee simple, for there is now only one kind of tenure by which such an estate can be held; and that is the tenure of *free and common socage* (*r*). The tenure of free and common socage is of great antiquity; so much so, that the meaning of the word *socage* is the subject only of conjecture (*s*). Com-

(*m*) 2 Black. Com. 63 et seq.; Scriven on Copyholds, 729. Wardship and marriage were no parts of the great feudal system, but were introduced into this country, and perhaps invented, by the Normans. 2 Hall. Midd. Ages, 415.

(*n*) As primer seisin, involuntary knighthood in certain cases, and fines for alienation.

(*o*) See ante, pp. 147, 148.

(*p*) Gilb. Ten. 431 et seq.;

Scriven on Copyholds, 719 et seq.

(*q*) Litt. ss. 91, 131, 132; Scriv. Cop. 732.

(*r*) 2 Black. Com. 101; ante, p. 148.

(*s*) See Litt. s. 119; Wright's Tenures, 143; 2 Black. Com. 80; Co. Litt. 86 a, n. (1); 2 Hallam's Middle Ages, 481. The controversy lies between the Saxon word *soc*, which signifies a liberty, privilege or franchise, especially one of jurisdiction, and the French

paratively few of the lands in this country were in ancient times the subject of this tenure. As we have seen (*t*), it appears from Domesday book that the landholders therein described as *sochemanni* and *liberi homines* were, at the time of the survey, rarely found out of the north-eastern counties. But this class of freeholders seems to have steadily spread and increased (*u*). And, by the time of Edward I., the free tenants of a manor, holding their land in socage, often by a money rent, have become prominent members of the agricultural community; whilst the *villani* of that period, of whose tenure the servile conditions are often especially noted in records, occupy an inferior position (*x*). The owners of fee simple estates, held by socage tenure, were not only personally free, but the services, which they were bound to render in respect of their holdings, were fixed and certain, and had no servile incidents; hence the term *free socage* (*y*). No military service was due, as the condition of the enjoyment of the estates. Homage to the lord, the invariable incident to

word *soc*, which signifies a plough-share. In favour of the former is urged the beneficial nature of the tenure, and also the circumstance that socagers were, as now, bound to attend the Court baron of the lord, to whose *soc* or right of justice they belonged. In favour of the latter derivation is urged the nature of the employment, as well as the most useful condition of tenure of the lands of socmen, who were principally engaged in agriculture. The former appears to be the more probable derivation. See Sir H. Ellis's Introduction to Domesday, vol. i. p. 69.

(*t*) Ante, p. 148.

) See Nasse, Agricultural Community of the Middle Ages (English translation), 32—36; Seebohm, English Village Community, 86 and note.

(*x*) See Nasse, 34—40; Hundred Rolls, 7 Edw. I. fol. 321, 334, 338, 623; see also Bracton, fol. 208 b.

(*y*) See Glanvil, lib. xii. c. 3; Bracton, lib. iv. c. 28, fol. 207 a, 208 b; 2 Black. Com. 60—62; Liber Niger Petroburgensis (circa A.D. 1125), published as an appendix to the Chronicon Petroburgense (Camden Society), pp. 157—166, where compare the services of the *sochemanni* with those of the *villani*.

the military tenures (*z*), was not often required (*a*); but the services, if any, were usually of an agricultural nature: a fixed rent was sometimes reserved; and in process of time the agricultural services appear to have been very generally commuted into such a rent. In all cases of annual rent, the *relief* paid by the heir, on the death of his ancestor, was fixed at one year's rent (*b*). Frequently no rent was due; but the owners were simply bound to take, when required, the oath of fealty to the lord of whom they held (*c*), to do suit at his Court, if he had one, and to give him the customary aids for knighting his eldest son and marrying his eldest daughter (*d*). This tenure was accordingly more beneficial than the military tenures, by which fee simple estates, in most other lands in the kingdom, were held. True, the actual military service, in respect of lands, became gradually commuted for an *escuage* or money payment, assessed on the tenants by knights' service from time to time, first at the discretion of the crown, and afterwards by authority of Parliament (*e*); and this commutation appears to have generally prevailed from so early a period as the time of Henry II. But the great superiority of the socage tenure was still felt in its freedom from the burdens of wardship and marriage, and other exactions, imposed on the tenants of estates in fee held by the other tenures (*f*). The wardship and marriage of an infant tenant of an estate held in socage devolved on his nearest relation, (to whom the inheritance could not descend,) who was strictly accountable for the rents

(*z*) Co. Litt. 65 a, 67 b, n. (1).

(*a*) Ibid. 86 a.

(*b*) Litt. s. 126; 2 Black. Com. 87. See *Passingham*, app., *Pitty*, resp., 17 C. B. 299, 300.

(*c*) Litt. ss. 117, 118, 131.

(*d*) Co. Litt. 91 a; 2 Black.

Com. 86.

(*e*) 2 Hallam's Middle Ages, 439, 440; 2 Black. Com. 74; Wright's Tenures, 131; Litt. s. 97; Co. Litt. 72 a.

(*f*) 2 Hallam's Middle Ages, 481.

and profits (*g*). As the commerce and wealth of the country increased, and the middle classes began to feel their own power, the burdens of the other tenures became insupportable; and an opportunity was at last seized of throwing them off. Accordingly, at the restoration of King Charles II., an Act of Parliament was insisted on and obtained, by which all tenures by knights' service, and the fruits and consequences of tenures in capite (*h*), were taken away, and all tenures of estates of inheritance in the hands of private persons (except copyhold tenures) were turned into free and common socage; and the same were for ever discharged from homage, wardships, values and forfeitures of marriage, and other charges incident to tenure by knights' service, and from aids for marrying the lord's daughter and for making his son a knight (*i*). Stat. 12 Car. II. c. 24.

The right of wardship or guardianship of infant tenants having thus been taken away from the lords, the opportunity was embraced of giving to the father a right of appointing guardians to his children. It was accordingly provided by the same Act of Parliament (*k*), that the father of any child under age and not married at the time of his death, may, by deed executed in his lifetime, or by his will in the presence of two or more credible witnesses, in such manner and from time to time as he shall think fit, dispose of the custody and tuition of such child during such time as he shall remain under the age of one-and-twenty years, or any lesser time, to any person or persons in possession or remainder. And this power was given whether the child was born at his father's decease or only *in ventre sa mère* at that time, and whether the father were Power for the
father to his
child.

(*g*) 2 Black. Com. 87, 88.

(*h*) Co. Litt. 108 a, n. (5).

(*i*) Stat. 12 Car. II. c. 24. The 12th Car. II. A.D. 1660, was the

first year of his actual

(*k*) Stat. 12 Car. II. c. 24, s. 8.

See *Morgan v. Hatchell*, 19 Beav.

within the age of one-and-twenty years, or of full age. But it seems that the father, if under age, cannot now appoint a guardian by *will*; for the Wills Act now enacts, that no will made by any person under the age of twenty-one years shall be valid (*l*). In other respects, however, the father's right to appoint a guardian still continues as originally provided by the above-mentioned statute of Charles II. The guardian so appointed has a right to receive the rents of the child's lands, for the use of the child, to whom, like a guardian in socage, he is accountable when the child comes of age (*m*). A guardian cannot be appointed by the mother of a child, or by any other relative than the father (*n*).

Rent.

A *rent* is not now often paid in respect of the tenure of an estate in fee simple. When it is paid, it is usually called a *quit rent* (*o*), and is almost always of a very trifling amount: the change in the value of money in modern times will account for this. The *relief* of one year's quit rent, payable by the heir on the death of his ancestor, in the case of a fixed quit rent, was not abolished by the statute of Charles, and such relief is

Relief.

(*l*) Stat. 7 Will. IV. & 1 Vict. c. 26, s. 7; 1 Jarm. Wills, 44, 4th ed.

(*m*) As to the management of land during the minority of an infant who is entitled thereto for an estate in fee simple under an instrument coming into operation after the 31st December, 1881, see stat. 44 & 45 Vict. c. 41, ss. 41, 42; Williams's Conveyancing Statutes, 200—210.

(*n*) *Ex parte Edwards*, 3 Atk. 519; Bac. Abr. tit. Guardian (A) 3. See also Mr. Hargraves' Notes to Co. Litt. 88 b.

(*o*) 2 Black. Com. 43; Co. Litt. 85 a, n. (1). A rent paid in respect of the tenure of an estate in fee simple, may now be redeemed by the tenant, *if the person entitled to the rent is absolutely entitled thereto in fee simple in possession, or is empowered to dispose thereof absolutely, or to give an absolute discharge for the capital value thereof*, by payment or tender after due notice of an amount of money certified by the Land Commissioners; stat. 44 & 45 Vict. c. 41, s. 45; see Williams's Conveyancing Statutes, 217, 218.

accordingly still due (*p*). Suit of Court also is still Suit of Court.
 obligatory on tenants of estates in fee simple, held of
 any manor now existing (*q*). And the oath of fealty Fealty.
 still continues an incident of tenure, as well of an estate
 in fee simple, as of every other estate, down to a tenancy
 for a mere term of years; but in practice it is seldom
 or never exacted (*r*).

There is yet another incident of the tenure of estates Escheat.
 in fee simple; an incident, which has existed from the
 earliest times, and is still occasionally productive of
 substantial advantage to the lord. As the donor of an
 estate for life has a certain reversion on his tenant's
 death, and as the donor of an estate in tail has also
 a reversion expectant on the decease of his tenant, and
 failure of his issue, but subject to be defeated by the
 proper bar, so the lord, of whom an estate in fee simple
 is held, possesses, in respect of his lordship or seignory,
 a similar (*s*), though more uncertain advantage, in his
 right of *escheat*; by which, if the estate happens to
 end, the lands revert to the lord, by whose ancestors
 or predecessors they were anciently granted to the
 tenant (*t*). When the tenant of an estate in fee simple
 dies, without having alienated his estate in his life-
 time, or by his will (*u*), and without leaving any
 heirs, lineal or collateral, either of the purchaser, or of
 the person last entitled to the lands, such lands *escheat*
 (as it is called) to the lord of whom they were held.

(*p*) Co. Litt. 85 a, n. (1); Scriv. Cop. 738.

(*q*) Scriv. Cop. 736.

(*r*) Co. Litt. 67 b, n. (2), 68 b, n. (5).

(*s*) Watk. Descent, p. 2 (pp. 5, 6, 7, 4th ed.).

(*t*) 2 Black. Com. 72; Scriv. Cop. 757 et seq.

(*u*) Year Book, 49 Edw. III. c. 17; Co. Litt. 236 a, n. (1);

Scriv. Cop. 762. But it may perhaps be doubted whether the new Wills Act (7 Will. IV. & 1 Vict. c. 26, s. 3) extends to this case, and whether, therefore, in order to prevent an escheat, three witnesses should not attest the will as under the old law, which still subsists as to wills to which the new Act does not extend (see sect. 2).

Bastardy.

Bastardy is the most usual cause of the failure of heirs; for a bastard is in law *nullius filius*; and, being nobody's son, he can consequently have no brother or sister, or any other heir than an heir of his body (*x*). If such a person, therefore, were to purchase lands, that is, to acquire an estate in fee simple in them, and were to die possessed of them without having made a will, and without leaving any issue, the lands would escheat to the lord of the fee, for want of heirs. Again, before forfeitures for treason and felony were abolished (*y*), sentence of death pronounced on a person convicted of high treason or murder, or of abetting, procuring, or counselling the same (*z*), caused his blood

Attainder.

to be attainted or corrupted, and to lose its inheritable quality. In cases of high treason, the crown became entitled by forfeiture to the lands of the traitor (*a*); but in the other cases the lord, of whom the estate was held, became entitled by *escheat* to the lands, after the death of the attainted person (*b*); subject, however, to the Queen's right of possession for a year and a day, and of committing waste, called the Queen's year, day, and waste,—a right usually compounded for (*c*). When an escheat occurs, the crown most frequently obtains the lands escheated, in consequence of the before-mentioned rule, that the crown was the original proprietor of all the lands in the kingdom (*d*). But if

(*x*) Co. Litt. 3 b; 2 Black. Com. 347; Bac. Abr. tit. Bastardy (B).

(*y*) By stat. 33 & 34 Vict. c. 23; ante, p. 80.

(*z*) Stat. 54 Geo. III. c. 145; 9 Geo. IV. c. 31, s. 2, repealed by stat. 24 & 25 Vict. c. 95, and re-enacted by stat. 24 & 25 Vict. c. 100, s. 8.

(*a*) Stat. 26 Hen. VIII. c. 13, s. 5; 5 & 6 Edw. VI. c. 11, s. 9; 39 Geo. III. c. 93; 4 Black. Com. 381.

(*b*) 2 Black. Com. 245; 4 Black. Com. 380, 381; Swinburne, pt. 2, sect. 13; Bac. Abr. tit. Wills and Testaments (B).

(*c*) 4 Black. Com. 385.

(*d*) Lands escheated or forfeited to the crown are frequently restored to the families of the persons to whom such lands belonged pursuant to stat. 39 & 40 Geo. III. c. 88, s. 12, explained and amended by stats. 47 Geo. III. sess. 2, c. 24; 59 Geo. III. c. 94,

there should be any lord of a manor, or other person, who could prove that the estate so terminated was held of him, he, and not the crown, would be entitled (e). In former times, there were many such mesne or intermediate lords; every baron, according to the feudal system, had his tenants, and they, again, had theirs. The alienation of lands appears, indeed, as we have seen (f), to have most generally, if not universally, proceeded on this system of subinfeudation. But now the fruits and incidents of tenure of estate in fee simple are so few and rare, that many such estates are considered as held directly of the crown, for want of proof as to who is the intermediate lord; and the difficulty of proof is increased by the fact before mentioned, that, since the statute of *Quia Emptores*, passed in the reign of Edward I. (g), it has not been lawful to create a tenure of an estate in fee simple; so that every lordship or seignory of an estate in fee simple bears date at least as far back as that reign: to this rule the few seignories, which may have been subsequently created by the king's tenants in capite, form the only exception (h).

A small occasional *quit rent*, with its accompanying *relief*,—*suit* of the Court Baron, if any such exists,—an oath of *fealty* never exacted,—and a right of *escheat* seldom accruing,—are now, it appears, therefore, the ordinary incidents of the tenure of an estate in fee simple. There are, however, a few varieties in this tenure which are worth mentioning; they respect either the *persons* to whom the estate was originally granted,

and 47 & 48 Vict. c. 71, and extended to forfeited leaseholds by stat. 6 Geo. IV. c. 17.

(e) *Doe d. Hayne and His Majesty v. Redfern*, 12 East, 96.

(f) Ante, pp. 59—62, 145, 147.

(g) 18 Edw. I. c. 1; ante, pp. 85, 144.

(h) By stat. 13 & 14 Vict. c. 60, lands vested in any person upon any trust, or by way of mortgage, are exempted from escheat. This Act repeals a former statute, 4 & 5 Will. IV. c. 23, to the same effect.

Grand ser-
jeanty.

Petit ser-
jeanty.

or the *places* in which the lands holden are situate. And, first, respecting the persons: the ancient tenure of *grand serjeanty* was where a man held his lands of the king by services to be done in his own proper person to the king, as, to carry the banner of the king, or his lance, or to be his marshal, or to carry his sword before him at his coronation, or to do other like services (*i*): when, by the statute of Charles II. (*k*), this tenure, with the others, was turned into free and common socage, the honorary services above described were expressly retained. The ancient tenure of *petit serjeanty* was where a man held his land of the king, "to yield him yearly a bow, or a sword, or a dagger, or a knife, or a lance, or a paire of gloves of maile, or a paire of gilt spurs, or an arrow, or divers arrowes, or to yield such other small things belonging to warre" (*l*): this was but socage in effect (*m*), because such a tenant was not to do any personal service, but to render and pay yearly certain things to the king. This tenure therefore still remains unaffected by the statute of Charles II.

Gavelkind.

Next, as to such varieties of tenure as relate to places:—These are principally the tenures of gavelkind, borough-English, and ancient demesne. The tenure of gavelkind, or as it has been more correctly styled (*n*), socage tenure, subject to the custom of gavelkind, prevails chiefly in the county of Kent, in which county all estates of inheritance in land (*o*) are presumed to be holden by this tenure until the contrary is shown (*p*). The most remarkable feature of this kind of tenure is the descent of the estate, in case of intes-

(*i*) Litt. s. 153.

(*k*) 12 Car. II. c. 24; ante, p. 153.

(*l*) Litt. s. 159.

(*m*) Litt. s. 160; 2 Black. Com. 81.

(*n*) Third Report of Real Property Commissioners, p. 7.

(*o*) Including estates tail, Litt. s. 265; Robinson on Gavelkind, 51, 94 (64, 119, 3rd ed.).

(*p*) Robinson on Gavelkind, 44 (54, 3rd ed.).

tacy, not to the eldest son, but to all the sons in equal shares (*q*), and so to brothers and other collateral relations, on failure of nearer heirs (*r*). It is also a remarkable peculiarity of this custom, that every tenant of an estate of freehold (except of course an estate tail) is able, at the early age of fifteen years, to dispose of his estate by feoffment (*s*), the ancient method of conveyance to be hereafter explained. There was also no escheat of gavelkind lands upon a conviction of murder (*t*); and some other peculiarities of less importance belong to this tenure (*u*). The custom of gavelkind is generally supposed to have been a part of the ancient Saxon law, preserved by the struggles of the men of Kent at the time of the Norman conquest; and it is still held in high esteem by the inhabitants, so that whilst some lands in the county, having been originally held by knights' service, are not within the custom (*x*), and others have been disgavelled, or freed from the custom, by various Acts of Parliament (*y*), any attempt entirely to extinguish the peculiarities of this tenure has uniformly been resisted (*z*). There are a few places, in

(*q*) Every son is as great a gentleman as the eldest son is; Litt. s. 210.

(*r*) Rob. Gav. 92; 3rd Rep. of Real Property Commissioners, p. 9; *Crump d. Woolley v. Norwood*, 7 Taunt. 362; *Hook v. Hook*, 1 Hemming & Miller, 43; in opposition to Bac. Abr. tit. Descent (D), citing Co. Litt. 140 a.

(*s*) Rob. Gav. 193 (248, 3rd ed.), 217 (277, 3rd ed.); 2 Black. Com. 84; Sandys' Consuetudines Kancie, p. 165. See stat. 8 & 9 Vict. c. 106, s. 3.

(*t*) Rob. Gav. 226 (228, 3rd ed.).

(*u*) The husband is tenant by courtesy of a moiety only of his

deceased wife's land, until he marries again, whether there were issue born alive or not; the widow also is dowable of a moiety instead of a third, and during widowhood and chastity only; estates in fee simple were devisable by will, before the statute was passed empowering the devise of such estates; and some other ancient privileges, now obsolete, were attached to this tenure. See Robinson on Gavelkind, *passim*; 3rd Report of Real Property Commissioners, p. 9.

(*x*) Rob. Gav. 46 (57, 3rd ed.).

(*y*) See Rob. Gav. 75 (94, 3rd ed.).

(*z*) An express saving of the

other parts of the kingdom, where the course of descent follows the custom of gavelkind (*a*); but it may be doubted whether the tenure of gavelkind, with all its accompanying peculiarities, is to be found elsewhere than in the county of Kent (*b*).

**Borough-
English.**

Tenure subject to the custom of borough-English owes its origin to the old law of tenure in burgage (*c*). It prevails in several cities and ancient boroughs, and districts adjoining to them; the tenure is socage, but, according to the custom, the estate descends to the *youngest son* in exclusion of all the other children (*d*). The custom does not in general extend to collateral relations; but by special custom it may, so as to admit the youngest *brother*, instead of the eldest (*e*). Estates, as well in tail as in fee simple, descend according to this custom (*f*).

**Ancient de-
mesne.**

The tenure of ancient demesne exists in those manors, and in those only, which belonged to the crown in the reigns of Edward the Confessor and William the Conqueror, and in Domesday Book are denominated *Terræ Regis Edwardi*, or *Terræ Regis* (*g*). The tenants are freeholders (*h*), and possess certain ancient immunities, the chief of which is a right to sue and be sued only in

custom of gavelkind is inserted in the Act for the commutation of certain manorial rights, &c. Stat. 4 & 5 Vict. c. 35, s. 80.

(*a*) Kitchen on Courts, 200; Co. Litt. 140 a.

(*b*) See Bac. Abr. tit. Gavelkind (B) 3.

(*c*) Ante, p. 149.

(*d*) Litt. s. 165; 2 Black. Com. 83.

(*e*) Comyns' Digest, tit. Borough-English; Watk. Descents, 89 (94, 4th ed.). See *Rider v.*

Wood, 1 Kay & Johns. 644.

(*f*) Rob. Gav. 94 (120, 3rd ed.).

(*g*) 2 Scriv. Cop. 687.

(*h*) The account given by Blackstone of this tenure as altogether copyhold (2 Black. Com. 100) appears to be erroneous, though no doubt there are copyholds of some of the lands of such manors. 3rd Rep. of Real Property Commissioners, p. 13; 2 Scriv. Cop. 691.

their lord's Court. Before the abolition of fines and recoveries, these proceedings, being judicial in their nature, could only take place, as to lands in ancient demesne, in the lord's Court; but, as the nature of the tenure was not always known, much inconvenience frequently arose from the proceedings being taken by mistake in the usual Court of Common Pleas at Westminster; and these mistakes have given to the tenure a prominence in practice which it would not otherwise have possessed. Such mistakes, however, have been corrected, as far as possible, by the Act for the abolition of fines and recoveries (*i*); and for the future, the substitution of a simple deed, in the place of those assurances, renders such mistakes impossible. So that this peculiar kind of socage tenure now possesses but little practical importance.

So much then for the tenure of free and common socage, with its incidents and varieties. There is yet another kind of ancient tenure still subsisting, namely, the tenure of *frankalmoign*, or free alms, already men-Frankal-tioned (*k*), by which the lands of the church are for the most part held. This tenure is expressly excepted from the statute 12 Car. II. c. 24, by which the other ancient tenures were destroyed. It has no peculiar incidents, the tenants not being bound even to do fealty to the lords, because, as Littleton says (*l*), the prayers and other divine services of the tenants are better for the lords than any doing of fealty. As the church is a body having perpetual existence, there is moreover no chance of any escheat. This tenure is therefore a very near practical approach to that absolute dominion on the part of the tenant, which yet in theory the law never allows.

(i) Stat. 3 & 4 Will. IV. c. 74,
ss. 4, 5, 6.

W.R.P.

(k) Ante, p. 60.

(l) Litt. s. 135; Co. Litt. 67 b.

CHAPTER VI.

OF JOINT TENANTS AND TENANTS IN COMMON.

A GIFT of lands to two or more persons in joint tenancy is such a gift as imparts to them, with respect to all other persons than themselves, the properties of one single owner. As between themselves, they must, of course, have separate rights; but such rights are equal in every respect, it not being possible for one of them to have a greater interest than another in the subject of the tenancy. A joint tenancy is accordingly said to be distinguished by unity of *possession*, unity of *interest*, unity of *title*, and unity of the *time* of the commencement of such title (*a*). Any estate may be held in joint tenancy; thus, if lands be given simply to A. and B. without further words, they will become at once joint tenants for life (*b*). Being regarded, with respect to other persons, as but one individual, their estates will necessarily continue so long as the longer liver of them exists. While they both live, as they must have several rights between themselves, A. will be entitled to one moiety of the rents and profits of the land, and B. to the other; but after the decease of either of them, the survivor will be entitled to the whole during the residue of his life. So, if lands be given to A. and B. and the heirs of their two bodies; here, if A. and B. be persons who may possibly intermarry, they will have an estate in special tail, descendible only to the heirs of their two

The four unities of joint tenancy.

Joint tenants for life.

Joint tenants in tail.

(*a*) 2 Black. Com. 180.

tit. Estates (K. 1); see ante, Litt. s. 283: Com. Dig. p. 24.

OF JOINT TENANTS AND TENANTS IN COMMON.

bodies (c): so long as they both live, they will be entitled to the rents and profits in equal shares; after the decease of either, the survivor will be entitled for life to the whole; and, on the decease of such survivor, the heir of their bodies, in case they should have intermarried, will succeed by descent, in the same manner as if both A. and B. had been but one ancestor. If, however, A. and B. be persons who cannot at any time lawfully intermarry, as, if they be brother and sister, or both males, or both females, a gift to them and the heirs of their two bodies will receive a somewhat different construction. So long as it is possible for a unity of interest to continue, the law will carry it into effect: A. and B. will accordingly be regarded as one person, and will be entitled jointly during their lives. While they both live their rights will be equal; and, on the death of either, the survivor will take the whole, so long as he may live. But, as they cannot intermarry, it is not possible that any one person should be heir of both their bodies: on the decease of the survivor, the law, therefore, in order to conform as nearly as possible to the manifest intent, that the heir of the body of each of them should inherit, is obliged to sever the tenancy and divide the inheritance between the heir of the body of A., and the heir of the body of B. Each heir will accordingly be entitled to a moiety of the rents and profits, as tenant in tail of such moiety. The heirs will now hold in a manner denominated tenancy in common; instead of both having the whole, each will have an undivided half, and no further right of survivorship will remain (d).

An estate in fee simple may also be given to two or more persons as joint tenants. The unity of this kind of tenure is remarkably shown by the words which are

Joint tenants
in fee.

(c) Co. Litt. 20 b, 25 b; Bac. Abr. tit. Joint Tenants (G).

(d) Litt. s. 283. See *Re ton Market Act*, 20 Beav. 374.

Trustees are

made use of to create a joint tenancy in fee simple. The lands intended to be given to joint tenants in fee simple are limited to them *and their heirs*, or to them, *their heirs and assigns* (e), although the heirs of one of them only will succeed to the inheritance, provided the joint tenancy be allowed to continue: thus, if lands be given to A., B. and C. *and their heirs*, A., B. and C. will together be regarded as one person; and, when they are all dead, but not before, the lands will descend to the heirs of the artificial person (so to speak) named in the gift. The survivor of the three, who together compose the tenant, will, after the decease of his companions, become entitled to the whole lands (f). While they all lived each had the whole; when any die, the survivors or survivor can have no more. The heir of the survivor is, therefore, the person who alone will be entitled to inherit, to the entire exclusion of the heirs of those who may have previously died (g). A joint tenancy in fee simple is far more usual than a joint tenancy for life or in tail. Its principal use in practice is for the purpose of vesting estates in trustees (h), who are invariably made joint tenants. On the decease of one of them, the whole estate then vests at once in the survivors or survivor of them, without devolving on the heir at law of the deceased trustee, and without being affected by any disposition which he may have made by his will; for joint tenants are incapable of devising their respective shares by will (i): they are not regarded as having any separate interests, except as between or amongst themselves, whilst two or more of them are living. Trustees, therefore, whose only interest is that of the persons for whom they hold in trust, are properly made joint tenants; and so long as any one of them is

(e) Bac. Abr. tit. Joint Tenants
(A); Co. Litt. 184 a.

(f) Litt. s. 280.

(g) Litt. ubi sup.

(h) See post, the chapter on
Uses and Trusts.

(i) Litt. s. 287; Perk. s. 500.

living, so long will every other person be excluded from the legal possession of the lands to which the trust extends. But on the decease of the surviving trustee, previously to the 1st January, 1882, the lands devolved on the devisee under his will, or on his heir-at-law. In the case of the death of the surviving trustee after the 31st December, 1881, the lands, notwithstanding any testamentary disposition, devolve to and become vested in his personal representative (*j*). And his devisee or heir formerly remained, and his personal representative now remains, trustee until a conveyance is made of the lands to some other trustee duly appointed.

As joint tenants together compose but one owner, it follows, as we have already observed, that the estate of each must arise at the same time (*k*) ; so that if A. and B. are to be joint tenants of lands, A. cannot take his share first, and then B. come in after him. To this rule, however, an exception has been made in favour of conveyances taking effect by virtue of the Statute of Uses, to be hereafter explained ; for it has been held that joint tenants under this statute may take their shares at different times (*l*) ; and the exception appears also to extend to estates created by will (*m*). A further consequence of the unity of joint tenants is seen in the fact, that if one of them should wish to dispose of his interest in favour of any of his companions, he may not make use of any mode of disposition operating merely as a conveyance of lands from one stranger to another.

Exception to
unity of time.

(*j*) Stat. 44 & 45 Vict. c. 41, s. 30 ; see Williams's Conveyancing Statutes, 170—176 ; *Re Pilling's Trusts*, 26 Ch. D. 432. (n) 2 Jarman on Wills, 254, 255, 4th ed. ; *Oates d. Hatterley v. Jackson*, 2 Strange, 1172 ; *Fearne, Cont. Rem.* 313 ; *Bridge v. Yates*, 12 Sim. 645 ; *Kenworthy v. Ward*, 11 Hare, 196 ; *M'Gregor v. M'Gregor*, 1 De Gex, F. & J. 73.

(*k*) Co. Litt. 188 a ; 2 Black. Com. 181.

(*l*) 13 Rep. 56 ; Pollexf. 373 ; Bac. Abr. tit. Joint Tenants (D) ; Gilb. Uses and Trusts, 71 (135,

A release is the proper form of assurance between joint tenants.

The legal possession or seisin of the whole of the lands belongs to each one of the joint tenants of an estate of freehold; no delivery can, therefore, be made to him of that which he already has. The proper form of assurance between joint tenants is, accordingly, a release by deed (*n*), and this release operates rather as an extinguishment of right than as a conveyance; for the whole estate is already supposed to be vested in each joint tenant, as well as his own proportion. And in the Norman French, with which our law abounds, two persons holding land in joint tenancy are said to be seised *per mie et per tout* (*o*).

A joint tenancy may be severed.

The incidents of a joint tenancy, above referred to, last only so long as the joint tenancy exists. It is in the power of any one of the joint tenants to *sever* the tenancy; for each joint tenant possesses an absolute power to dispose, in his lifetime, of his own share of the lands, by which means he destroys the joint tenancy (*p*). Thus, if there be three joint tenants of lands in fee simple, any one of them may, by any of the usual modes of alienation, dispose during his lifetime, though not by will, of an equal undivided third part of the whole inheritance. But should he die without having made such disposition, each one of the remaining two will have a similar right in his lifetime to dispose of an undivided moiety of the whole. From the moment of severance, the unity of interest and title is destroyed, and nothing is left but the unity of possession; the share which has been disposed of is at once discharged from the rights and incidents of joint tenancy, and becomes the subject of a tenancy in common. Thus, if there be three joint tenants, and any

(*n*) Co. Litt. 169 a; Bac. Abr. tit. Joint Tenants (I) 3, 2; 2 Prest. Abst. 61. But a grant would operate as a release; *Chester v. Willan*, 2 Wms. Saund. 96 a.

(*o*) Litt. s. 288.

(*p*) Co. Litt. 186 a; *Caldwell v. Felloices*, L. R., 9 Eq. 410; *Baillie v. Treharne*, 17 Ch. D. 388.

one of them should exercise his power of disposition in favour of a stranger, such stranger will then hold one undivided third part of the lands, as tenant in common with the remaining two.

Tenants in common are such as have a unity of possession, but a distinct and several title to their shares (*q*). The shares in which tenants in common hold are by no means necessarily equal. Thus, one tenant in common may be entitled to one-third, or one-fifth, or any other proportion of the profits of the land, and the other tenant or tenants in common to the residue. So, one tenant in common may have but a life or other limited interest in his share, another may be seised in fee of his, and the owners of another undivided share may be joint tenants as between themselves, whilst as to the others they are tenants in common. Between a joint tenancy and tenancy in common, the only similarity that exists is therefore the unity of possession. A tenant in common is, as to his own undivided share, precisely in the position of the owner of an entire and separate estate.

Tenants in
common.

When the rights of parties are distinct, that is, for instance, when they are not all trustees for one and the same purpose, both a joint tenancy and a tenancy in common are inconvenient methods for the enjoyment of property. Of the two a tenancy in common is no doubt preferable; inasmuch as a certain possession of a given share is preferable to a similar chance of getting or losing the whole, according as the tenant may or may not survive his companions. But the enjoyment of lands in *severalty* (*r*) is far more beneficial than either of the above modes. Accordingly it is in the power of any joint tenant or tenant in common to compel his

(*q*) Litt. s. 292; 2 Black. Com. (r) Ante, p. 129.

Partition by writ.

Partition by Court of Chancery.

By High Court of Justice.

companions to effect a *partition* between themselves, according to the value of their shares. This partition was formerly enforced by a writ of partition, granted by virtue of statutes passed in the reign of Henry VIII. (*s*). Before this reign, as joint tenants and tenants in common always become such by their own act and agreement, they were without any remedy, unless they all agreed to the partition; whereas we have seen (*t*) that co-parceners, who become entitled by act of law, could always compel partition. In modern times, the Court of Chancery was found to be the most convenient instrument for compelling the partition of estates (*u*); and by a modern statute (*x*), the old writ of partition, which had already become obsolete, was abolished. The Supreme Court of Judicature Act, 1873 (*y*), transferred this jurisdiction to the High Court of Justice thereby established. Whether the partition be effected through the agency of the Court, or by the mere private agreement of the parties, mutual conveyances of their respective undivided shares must be made, in order to carry the partition into complete effect (*z*). With respect to joint tenants, these conveyances ought, as we have seen, to be in the form of releases; but tenants in common, having separate titles, must make mutual conveyances, as between strangers; and by a modern statute it is provided, that a partition shall be void at law, unless made by deed (*a*). If any of the parties entitled should be infants under age, lunatic, or of unsound mind, and consequently unable to execute a

(*s*) 31 Hen. VIII. c. 1; 32 Hen. VIII. c. 32.

(*t*) Ante, p. 128.

(*u*) See *Manners v. Charlesworth*, 1 Mylne & Keen, 330.

(*x*) Stat. 3 & 4 Will. IV. c. 27, s. 36.

(*y*) Stat. 36 & 37 Vict. c. 66, ss. 16, 17. By stat. 37 & 38 Vict.

c. 83, the commencement of this act was postponed to the 1st of November, 1875.

(*z*) *Attorney-General v. Hamilton*, 1 Madd. 214.

(*a*) Stat. 8 & 9 Vict. c. 106, s. 3, repealing stat. 7 & 8 Vict. c. 76, s. 3, to the same effect.

conveyance, the Court has power to carry out its own decree for a partition by making an order, which will vest their shares in such persons as the Court shall direct (*b*). By the Settled Land Act, 1882 (*c*), the tenant for life under a settlement of an undivided share of land is empowered to concur in making partition of the entirety, and to convey the land given on partition for all the estate, which is the subject of the settlement, in the manner requisite for giving effect to the partition. Another very convenient mode of effecting a partition is, by application to the land commissioners for England, who are empowered by recent Acts of Parliament to make orders under their hands and seal for the partition and exchange of lands and other hereditaments, which orders are effectual without any further conveyance or release (*d*).

Partition by
Land Com-
missioners.

In the year 1868 an Act passed to amend the law relating to partition (*e*). By this Act the Court of Chancery was empowered to direct a sale of the property instead of a partition, whenever a sale and distribution of the proceeds appeared to the Court to be more beneficial to the parties interested (*f*). The jurisdiction of the Court of Chancery in all these matters is now transferred to the High Court of Justice (*g*) as from

Act to amend
the law of
partition.

(*b*) Stat. 13 & 14 Vict. c. 60, ss. 3, 7, 30.

(*c*) Stat. 45 & 46 Vict. c. 38, ss. 3, 20; see Williams's Conveyancing Statutes, 295—297, 321—325.

(*d*) Stat. 8 & 9 Vict. c. 118, ss. 147, 150; 9 & 10 Vict. c. 70, ss. 9, 10, 11; 10 & 11 Vict. c. 111, ss. 4, 6; 11 & 12 Vict. c. 99, ss. 13, 14; 12 & 13 Vict. c. 83, ss. 7, 11; 15 & 16 Vict. c. 79, ss. 31, 32; 17 & 18 Vict. c. 97,

ss. 5; 20 & 21 Vict. c. 31, ss. 1—11; 21 & 22 Vict. c. 53; 22 & 23 Vict. c. 43, ss. 10, 11; 39 & 40 Vict. c. 56, s. 33; see stat. 45 & 46 Vict. c. 38, s. 48; Williams's Conveyancing Statutes, 348—350.

(*e*) Stat. 31 & 32 Vict. c. 40, amended by stat. 39 & 40 Vict. c. 17.

(*f*) Sect. 3.

(*g*) Stat. 36 & 37 Vict. c. 66, s. 16.

the first of November, 1875 (*h*). If the parties interested to the extent of a moiety or upwards request a sale, the Court shall, unless it sees good reason to the contrary, direct a sale of the property accordingly (*i*). And if any party interested requests a sale the Court may, if it thinks fit, unless the other parties interested or some of them undertake to purchase the share of the party requesting a sale, direct a sale of the property (*j*). This alteration of the law, which was some time since suggested by the author (*k*), has effected a substantial improvement.

(*h*) Stat. 37 & 38 Vict. c. 83.

(*i*) Sect. 4; *Wilkinson v. Joberns*, L. R., 16 Eq. 14; *Porter v. Lopes*, L. R., 7 Ch. D. 358.

(*j*) Stat. 37 & 38 Vict. c. 83,

s. 5; see *Williams v. Games*, L. R., 10 Ch. 204; *Pitt v. Jones*, 5 App. Cas. 651.

(*k*) Essay on Real Assets, p.

129.

CHAPTER VII.

OF A FEOFFMENT.

HAVING now considered the most usual freehold estates which are holden in lands, and the varieties of holding arising from joint tenancies and tenancies in common, we proceed to the means to be employed for the transfer of these estates from one person to another. And here we must premise that, by enactments of the present reign (*a*), the conveyance of estates has been rendered, for the future, a matter independent of that historical learning which was formerly necessary. But, as the means formerly necessary for the conveyance of freeholds depend on principles, which still continue to exert their influence throughout the whole system of real property law, these means of conveyance and their principles must yet continue objects of the early attention of every student: of these means the most ancient is a *feoffment with livery of seisin* (*b*), which accordingly forms the subject of our present chapter.

Feoffment
with livery of
seisin.

The feudal doctrine explained in the fifth chapter, that all estates in land are holden of some lord, necessarily implies that all lands must always have some feudal holder or tenant. This feudal tenant is the freeholder, or holder of the freehold; he has the feudal possession, called the *seisin* (*c*), and so long as he is *seised*, nobody else can be. The freehold is said to be *in* him, and till it is taken out of him and given to some other,

(*a*) Stat. 8 & 9 Vict. c. 106,
repealing stat. 7 & 8 Vict. c. 76;
stat. 44 & 45 Vict. c. 41.

(*b*) 2 Black. Com. 310.
(*c*) Co. Litt. 153 a; Watkins
on Descents, 108 (113, 4th ed.).

the land itself is regarded as in his custody or possession. Now this legal possession of lands—this seisin of the freehold—is a matter of great importance, and much formerly depended upon its proper transfer from one person to another; thus we have seen that, before the Act for the amendment of the law of inheritance, seisin must have been acquired by every heir before he could himself become the stock of descent (*d*). The transfer or delivery of the seisin, though it accompanies the transfer of the estate of the holder of the seisin, is yet not the same thing as the transfer of his estate. For a tenant merely for life is as much a feudal holder, and consequently as much in possession, or seised, of the freehold, as a tenant in fee simple can be. If, therefore, a person seised of an estate in fee simple were to grant a lease to another for his life, the lessee must necessarily have the whole seisin given up to him, although he would not acquire the whole estate of his lessor; for an estate for life is manifestly a less estate than an estate in fee simple. In ancient times, however, possession was the great point; and, until the enactments above referred to (*e*), the conveyance of an estate of freehold was of quite a distinct character from such assurances as were made use of, when it was not intended to affect the freehold or feudal possession. For instance, we have seen that a tenant for a term of years is regarded in law as having merely a chattel interest (*f*); he has not the feudal possession or freehold in himself, but his possession, like that of a bailiff or servant, is the possession of his landlord. The consequence is, that any expressions in a deed, from which an intention can be gathered to grant the occupation of land for a certain time, have always been sufficient for a lease for a term of years however long (*g*); but a lease

(*d*) Ante, pp. 125, 126.

(*f*) Ante, p. 11.

(*e*) Stat. 8 & 9 Vict. c. 106, repealing stat. 7 & 8 Vict. c. 76.

(*g*) Bac. Abr. tit. Leases and Terms for Years (K).

OF A FEOFFMENT.

for a single life, which transfers the freehold, formerly required technical language to give it effect.

A feoffment with livery of seisin was then nothing more than a gift of an estate in the land with *livery*,^{Livery in deed.} that is, delivery of the *seisin* or feudal possession (*h*); this livery of seisin was said to be of two kinds, a *livery in deed* and a *livery in law*. Livery in deed was performed "by delivery of the ring or haspe of the door, or by a branch or twigge of a tree, or by a turfe of land, and with these or the like words, the feoffor and feoffee both holding the deed of feoffment and the ring of the doore, haspe, branch, twigge or turfe, and the feoffor saying, 'Here I deliver you seisin and possession of this house, in the name of all the lands and tenements contained in this deed according to the forme and effect of this deed,' or by words without any ceremony or act, as the feoffor being at the house doore, or within the house, 'Here I deliver you seisin and possession of this house, in the name of seisin and possession of all the lands and tenements contained in this deed' " (*i*). The feoffee then, if it were a house, entered alone, shut the door, then opened it, and let in the others (*k*). In performing this ceremony, it was requisite that all persons who had any estate or possession in the house or land, of which seisin was delivered, should either join in or consent to making the livery, or be absent from the premises; for the object was to give the entire and undisputed possession to the feoffee (*l*). If the feoffment was made of different lands lying scattered in one and the same county, livery of seisin of any parcel in the name of the rest was sufficient for all, if all were in the complete possession of the same

(*h*) Co. Litt. 271 b, n. (1).

(*i*) Co. Litt. 48 a.

(*k*) 2 Black. Com. 315; 2 Sand.

Uses, 4.

(*l*) Shep. Touch. 213; *Doe d. Reed v. Taylor*, 5 Barn. & Adol. 575.

feoffor; but if they were in several counties, there must have been as many liveries as there were counties (*m*). For if the title to these lands should come to be disputed, there must have been as many trials as there were counties; and the jury of one county are not considered judges of the notoriety of a fact in

Livery in law.

another (*n*). Livery in *law* was not made *on* the land, but *in sight of it* only, the feoffor saying to the feoffee, "I give you yonder land, enter and take possession."

If the feoffee entered accordingly in the lifetime of the feoffor, this was a good feoffment; but if either the feoffor or feoffee died before entry, the livery was void (*o*). This livery was good although the land lay in another county (*p*); but it required always to be made between the parties themselves, and could not be deputed to an attorney, as might livery in deed (*q*).

The word *give* to be used.

The word *give* was the apt and technical term to be employed in a feoffment (*r*); its use arose in those times when gifts from feudal lords to their tenants were the conveyances principally employed.

The estate taken must be marked out or *limited*.

addition to the livery of seisin, it was also necessary that the estate which the feoffee was to take should be marked out, whether for his own life or for that of another person, or in tail, or in fee simple, or otherwise. This marking out of the estate is as necessary now as formerly, and it is called *limiting* the estate. If the feudal holding is transferred, the estate must necessarily be an estate of freehold; it cannot be an

(*m*) Litt. s. 61. But a manor, the site of which extended into two counties, appears to have been an exception to this rule; for it was but as one thing for the purpose of a feoffment; Perkins, sect. 227. See, however, Hale's MS., Co. Litt. 50 a, n. (2).

(*n*) Co. Litt. 50 a; 2 Black. Com. 315.

(*o*) Co. Litt. 48 b; 2 Black. Com. 316.

(*p*) Co. Litt. 48 b.

(*q*) Co. Litt. 52 b.

(*r*) Co. Litt. 9 a; 2 Black. Com. 310.

estate at will, or for a fixed term of years merely. Thus the land may be given to the feoffee to hold to himself simply; and the estate so limited is, as we have seen (s), but an estate for his life (t), and the feoffee is then generally called a *lessee* for his life; though when a mere life interest is intended to be limited, the land is usually expressly given to hold to the lessee "during the term of his natural life" (u). If the land be given to the feoffee *and the heirs of his body*, he has an estate tail, and is called a *donee* in tail (v). And in order to confer an estate tail, it was necessary in every conveyance made previously to the 1st January, 1882 (except in a will, where greater indulgence is allowed), that words of *procreation*, such as *heirs of his body*, should be made use of; for a gift of lands to a man and his *heirs male* is an estate in fee simple, and not in fee tail, there being no words of procreation to ascertain the body out of which they shall issue (x); and an estate in lands descendible to collateral male heirs only, in entire exclusion of females, is unknown to the English law (y). If the land be given to hold to the feoffee *and his heirs*, he has an estate in fee simple, the largest estate which the law allows. In every conveyance (except by will) of an estate of inheritance, whether in fee tail or in fee simple, made previously to the 1st January, 1882, the word *heirs* was necessary to be used as a word of limitation to mark out the estate. This is not the case now, for by the Conveyancing and Law of Property Act, 1881 (z), in deeds executed after the 31st December, 1881, it is suf-

An estate for life.

An estate tail.

An estate in fee simple.

The word *heirs* to be used.

Words in *fe*

may now be

(s) Ante, p. 24.

(t) Litt. s. 1; Co Litt. 42 a.

(u) Ante, p. 29.

(v) Litt. s. 57; ante, p. 58.

(x) Litt. s. 31; Co. Litt. 27 a; 2 Black. Com. 415; *Doe d. Brune v. Martyn*, 8 Barn. & Cress. 497.

(y) But a grant of arms by the

crown to a man and his heirs male, without saying "of the body," is good, and they will descend to his heirs male, lineal or collateral. Co. Litt. 27 a.

(z) Stat. 44 & 45 Vict. c. 41, s. 51; Williams's Conveyancing Statutes, 225.

ficient, in the limitation of an estate in fee simple, to use the words *in fee simple*, without the word *heirs*; and in the limitation of an estate in tail, to use the words *in tail* without the words *heirs of the body*; and in the limitation of an estate in tail male or in tail female, to use the words *in tail male*, or *in tail female*, as the case requires, without the words *heirs male of the body* or *heirs female of the body*. But it is conceived that, unless the exact words specified in the above enactment be made use of, the word *heirs* must still be introduced in order to limit an estate of inheritance. Thus if a grant be made to a man *and his seed*, or to a man *and his offspring*, or to a man *and the issue of his body*, all these are insufficient to confer an estate tail, and only give an estate for life for want of the word *heirs* (*a*); so if a man purchase lands to have and to hold *to him for ever*, or to him *and his assigns for ever*, he will have but an estate for his life, and not a fee simple (*b*). Before alienation was permitted, the heirs of the tenant were the only persons, besides himself, who could enjoy the estate; and if they were not mentioned, the tenant could not hold longer than for his own life (*c*); hence arose the necessity of the word *heirs* to create an estate in fee tail or fee simple. At the present day, the free transfer of estates in fee simple is universally allowed; but this liberty, as we have seen (*d*), is now given by the law and not by the particular words by which an estate may happen to be created. So that, though conveyances of estates in fee simple, when the 51st section of the Conveyancing and Law of Property Act, 1881, is not relied on, are usually made to hold to the purchaser, *his heirs and assigns for ever*, yet the word *heirs* alone gives him a fee simple, of which the law enables him to dispose; and the remaining words, *and assigns for*

(*a*) Co. Litt. 20 b; 2 Black. Com. 115.

(*b*) Litt. s. 1; Co. Litt. 20 a.

(*c*) Ante, pp. 21—24.

(*d*) Ante, p. 64.

ever, have at the present day no conveyancing virtue at all; but are merely declaratory of that power of alienation which the purchaser would possess without them.

The formal delivery of the seisin or feudal possession, which always took place in a feoffment, rendered it, till recently, an assurance of great power; so that, if a person should have made a feoffment to another of an estate in fee simple, or of any other estate, not warranted by his own interest in the lands, such a feoffment would have operated *by wrong*, as it is said, and would have conferred on the feoffee the whole estate limited by the feoffment along with the seisin actually delivered.

A feoffment might have created an estate by wrong.

Thus if a tenant for his own life should have made a feoffment of the lands for an estate in fee simple, the feoffee would not merely have acquired an estate for the life of the feoffor, but would have become seised of an estate in fee simple by wrong; accordingly, such a feoffment by a tenant for life was regarded as a cause of forfeiture to the person entitled in reversion; such a feoffment being in fact a conveyance of his reversion, without his consent, to another person. In the same manner, feoffments made by idiots and lunatics appear to have been only voidable and not absolutely void (*c*); whereas their conveyances made by any other means are void *in toto*; for, if the seisin was actually delivered to a person, though by a lunatic or idiot, the accompanying estate must necessarily have passed to him, until he should have been deprived of it.

Feoffment by tenant for life.

By idiots and lunatics.

Again, the formal delivery of the seisin in a feoffment appears to be the ground of the validity of such a conveyance of gavelkind lands, by an infant of the age of fifteen years (*f*); although a conveyance of the same lands by the infant, made by any other means, would

By infants of

(*c*) Ante, p. 89.

(*f*) Ante, p. 159.

New enactment.

be voidable by him, on attaining his majority (*g*). By the Act to amend the law of real property (*h*), it is, however, now provided, that a feoffment shall not have any tortious operation: but a feoffment made under a custom by an infant is expressly recognized (*i*).

The Statute of Uses.

A consideration required, or the gift to be made to the use of the feoffee.

Down to the time of King Henry VIII. nothing more was requisite to a valid feoffment than has been already mentioned. In the reign of this king, however, an Act of Parliament of great importance was passed, known by the name of the Statute of Uses (*k*). And since this statute, it has now become further requisite to a feoffment, either that there should be a *consideration* for the gift, or that it should be expressed to be made, not simply *unto*, but *unto and to the use of* the feoffee. The manner in which this result has been brought about by the Statute of Uses will be explained in the next chapter.

Writing formerly unnecessary.

If proper words of gift were used in a feoffment, and witnesses were present who could afterwards prove them, it mattered not, in ancient times, whether or not they were put into writing (*l*); though writing, from its greater certainty, was generally employed (*m*). There was this difference, however, between writing in those days, and writing in our own times. In our own times, almost everybody can write; in those days very few of the landed gentry of the country were so learned as to be able to sign their own names (*n*). Accordingly, on every important occasion, when a written document was required, instead of signing their names, they affixed their seals; and this writing, thus sealed, was delivered

(*g*) Ante, p. 89.

(*h*) Stat. 8 & 9 Vict. c. 106,

s. 4.

(*i*) Sect. 3.

(*k*) Stat. 27 Hen. VIII. c. 10.

(*l*) Bracton, lib. 2, fol. 11 b,

par. 3, 33 b, par. 1; Co. Litt. 48 b, 121 b, 143 a, 271 b, n. (1).

(*m*) Madox's Form. Angl. Dissert. p. 1.

(*n*) 3 Hallam's Middle Ages, 329; 2 Black. Com. 305, 306.

to the party for whose benefit it was intended. Writing was not then employed for every trivial purpose, but was a matter of some solemnity; accordingly, it became a rule of law, that every writing under seal imported a consideration (*o*):—that is, that a step so solemn could not have been taken without some sufficient ground. This custom of sealing remained after the occasion for it had passed away, and writing had been generally introduced; so that, in all legal transactions, a seal was affixed to the written document, and the writing so sealed was, when delivered, called a *deed*, in Latin *A deed.* *factum*, a thing done; and, for a long time after writing had come into common use, a written instrument, if unsealed, had in law no superiority over mere words (*p*); nothing was in fact called a *writing*, but a document under seal (*q*). And at the present day a *deed*, or a writing sealed and delivered (*r*), still imports a consideration, and maintains in many respects a superiority in law over a mere unsealed writing. In modern practice the kind of seal made use of is not regarded, and the mere placing of the finger on a seal already made, is held to be equivalent to sealing (*s*); and the words “I deliver this as my act and deed,” which are spoken at the same time, are held to be equivalent to delivery, even if the party keep the deed himself (*t*). The sealing *Execution.* and delivery of a deed are termed the *execution* of it. Occasionally a deed is delivered to a third person not a party to it, to be delivered up to the other party or

(*o*) Plowden, 308; 3 Burrow, 1639; 1 Fonblanque on Equity, 342; 2 Fonb. Eq. 26.

(*p*) See Litt. ss. 250, 252; Co. Litt. 9 a, 49 a, 121 b, 143 a, 169 a; *Rann v. Hughes*, 7 T. Rep. 350, n.

(*q*) See Litt. ss. 365, 366, 367; Shep. Touch. by Preston, 320, 321; Sugden's Vend. & Pur. 126, 11th ed.

(*r*) Co. Litt. 171 b; Shep. Touch. 50.

(*s*) Shep. Touch. 57.

(*t*) *Doe d. Garmons v. Knight*, 5 Barn. & Cress. 671; *Grugeon v. Gerrard*, 4 You. & Coll. 119, 130; *Exton v. Scott*, 6 Sim. 31; *Fletcher v. Fletcher*, 4 Hare, 67. See also *Hall v. Bambridge*, 12 Q. B. 699.

Escrow.

Alteration,
rasure, &c.

parties, upon the performance of a condition, as the payment of money or the like. It is then said to be delivered as an *escrow* or mere writing (*scriptum*); for it is not a perfect deed until delivered up on the performance of the condition; but when so delivered up, it operates from the time of its execution (*u*). Any alteration or rasure in or addition to a deed is presumed to have been made before its execution (*v*). And it was formerly held that any alteration, rasure or addition made in a material part of a deed, after its execution by the grantor, even though made by a stranger, would render it void, and that any alteration in a deed made by the party to whom it was delivered, though in words not material, would also render it void (*x*). But a more reasonable doctrine has lately prevailed; and it has now been held that the filling in of the date of the deed, or of the names of the occupiers of the lands conveyed, or any such addition, if consistent with the purposes of the deed, will not render it void, even though done by the party to whom it has been delivered, after its execution (*y*). If an estate has once been conveyed by a deed, of course the subsequent alteration, or even the destruction, of the deed cannot operate to reconvey the estate; and the deed, even though cancelled, may be given in evidence to show that the estate was conveyed by it whilst it was valid (*z*). But the deed having become void, no action could be brought upon any covenant contained in it (*a*).

(*u*) See Shep. Touch. 58, 59; *Bowker v. Burdekin*, 11 Mees. & Wels. 128, 147; *Nash v. Flynn*, 1 Jones & Lat. 162; *Graham v. Graham*, 1 Ves. jun. 275; *Miller-ship v. Brookes*, 5 H. & N. 797; *Watkins v. Nash*, L. R., 20 Eq. 262.

(*v*) *Doe d. Tatum v. Catmore*, 16 Q. B. 745.

(*x*) *Pigot's case*, 11 Rep. 27 a.

(*y*) *Aldous v. Cornwell*, L. R., 3 Q. B. 573; *Adsetts v. Hives*, 33 Beav. 55.

(*z*) *Lord Ward v. Lumley*, 5 H. & N. 87, 656.

(*a*) *Pigot's case*, 11 Rep. 27 a; Principles of the Law of Personal Property, p. 111, 11th ed.; 135, 12th ed.; *Hall v. Chandless*, 4 Bing. 123. It is now felony not only to steal, but also for any

OF A FEOFFMENT.

Previously to the Stamp Act, 1870 (*b*), every deed, if not charged with any *ad valorem* or other stamp duty, nor expressly exempted from all stamp duty, was liable to a stamp duty of 1*l.* 15*s.*; and if the deed, together with any schedule, receipt or other matter put or indorsed thereon or annexed thereto, contained 2160 words, or 30 common law folios of 72 words each, or upwards, it was liable to a further *progressive* duty of 10*s.* for every *entire* quantity of 1080 words, or 15 folios, over and above the first 1080 words. But the duplicate or counterpart of any deed was liable only to a stamp duty of five shillings and a *progressive* duty of half-a-crown, unless the original were liable to a less duty, in which case the duty was the same as on the original. If, however, the deed were signed or executed by any party thereto, or bore date, before or upon the 10th of October, 1850, when the former Act to amend the stamp duties took effect, then the *progressive* duty was 1*l.* 5*s.* for every *entire* quantity of 1080 words beyond the first 1080 (*c*). But the Stamp Act, 1870 (*d*), has now consolidated and amended the provisions relating to the stamp duties. The stamp duty for a deed of any kind not described in the schedule to the Act, is now only 10*s.* (*e*); and all *progressive* duties are abolished. The duplicate or counterpart of any deed is subject to the same duty as before, except the *progressive* duty (*f*).

Stamps on deeds.

Duplicate or counterpart.

The Stamp Act, 1870.

Progressive duties abolished.

Duplicate or counterpart.

Deeds are divided into two kinds, *deeds pol'* and *indentures*: a deed poll being made by one party only, and an indenture being made between two or more parties. Formerly, when deeds were more concise than at present, it was usual, where a deed was made

Deeds poll and indentures.

fraudulent purpose to destroy, cancel, obliterate or conceal any document of title to lands. Stat. 24 & 25 Vict. c. 96, s. 28.

(*b*) Stat. 33 & 34 Vict. c. 97.

(*c*) Stat. 55 Geo. III. c. 184;

13 & 14 Vict. c. 97; 24 & 25 Vict. c. 91, s. 31.

(*d*) Stat. 33 & 34 Vict. c. 97.

(*e*) Schedule to Act, tit. Deed.

(*f*) Schedule to Act, tit. Duplicate.

between two parties, to write two copies upon the same piece of parchment, with some word or letters of the alphabet written between them, through which the parchment was cut, often in an indented line, so as to leave half the word or letters on one part, and half on the other, thus serving the purpose of a tally. But at length indenting only came into use (*g*); and now every deed, to which there is more than one party, is cut with an indented or waving line at the top, and is called an *indenture* (*h*). Formerly, when a deed assumed the form of an indenture, every person who took any immediate benefit under it was always named as one of the parties. But now, by the Act to amend the law of real property it is enacted that, under an indenture, an immediate estate or interest in any tenements or hereditaments, and the benefit of a condition or covenant respecting any tenements or hereditaments, may be taken although the taker thereof be not named a party to the same indenture; also that a deed, purporting to be an indenture, shall have the effect of an indenture, although not actually indented (*i*). A deed made by only one party is polled, or shaved even at the top, and is therefore called a *deed poll*; and, under such a deed, any person may accept a grant, though of course none but the party can make one. All deeds must be written either on paper or parchment (*k*).

Person taking
benefit need
not be a
party.

Deed poll.

Writings not
under seal.

So manifest are the advantages of putting down in writing matters of any permanent importance, that, as commerce and civilization advanced, writings not under seal must necessarily have come into frequent use; but, until the reign of King Charles II., the use of writing remained perfectly optional with the parties, in every

2 Black. Com. 295.

(*h*) Co. Litt. 143 b.

(*i*) Stat. 8 & 9 Vict. c. 106,
s. 5, repealing stat. 7 & 8 Vict.

c. 76, s. 11, to the same effect.

(*k*) Shep. Touch. 54; 2 Black.
Com. 297.

case which did not require a deed under seal. In this reign, however, an Act of Parliament was passed (*l*), requiring the use of writing in many transactions, which previously might have taken place by mere word of mouth. This Act is intituled "An Act for Prevention of Frauds and Perjuries," and is now commonly called the Statute of Frauds. It enacts (*m*), amongst other things, that all leases, estates, interests of freehold, or terms of years, or any uncertain interests, in messuages, manors, lands, tenements or hereditaments, made or created by livery of seisin only, or by parol, and not put in writing, and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only, and no greater force and effect; any consideration for making any such parol leases or estates, or any former law or usage to the contrary notwithstanding. The only exception to this sweeping enactment is in favour of leases not exceeding three years from the making, and on which a rent of two-thirds at least of the full improved value is reserved to the landlord (*n*). In consequence of this Act, it became necessary that a feoffment should be put into writing, and signed by the party making the same, or his agent lawfully authorized by writing; but a deed or writing *under seal* was not essential (*o*), if livery of seisin were duly made. But now by the Act to amend the law of real property (*p*), it is provided that a feoffment, other than a feoffment made under a custom by an infant, shall be void at law, unless evidenced by deed (*q*). Where a deed is made use of, it is a matter of doubt, whether signing, as well as sealing, is absolutely necessary: previously to the Statute of Frauds, signing was not at all essential to a deed, provided it

The Statute
of Frauds.

An exception

A deed now
necessary.

Whether
signing of
deeds neces-

(*l*) Stat. 29 Car. II. c. 3.

(*m*) Sect. 1.

(*n*) Sect. 2.

(*o*) 3 Prest. Abst. 110.

(*p*) Stat. 8 & 9 Vict. c. 106.

(*q*) Sect. 3.

were only sealed and delivered (*r*) ; and the Statute of Frauds seems to be aimed at transactions by parol only, and not to be intended to affect deeds. Of this opinion is Mr. Preston (*s*). Sir William Blackstone, on the other hand, thinks signing now to be as necessary as sealing (*t*). And the Court of Queen's Bench has, if possible, added to the doubt (*u*). Mr. Preston's, however, appears to be the better opinion (*x*). However this may be, it would certainly be most unwise to raise the question by leaving any deed sealed and delivered, but not signed.

Legal doubts.

The doubt above mentioned is just of a class with many others, with which the student must expect to meet. Lying just by the side of the common highway of legal knowledge, it yet remains uncertain ground. The abundance of principles and the variety of illustrations to be found in legal text books, are apt to mislead the student into the supposition, that he has obtained a map of the whole country which lies before him. But further research will inform him that this opinion is erroneous, and that, though the ordinary paths are well beaten by author after author again going over the same ground, yet much that lies to the right hand and to the left still continues unexplored, or known only as doubtful and dangerous. The manner in which our laws are formed is the chief reason for this prevalence of uncertainty. Parliament, the great framer of the laws, seldom undertakes the task of interpreting them, a task indeed which would itself be less onerous, were more care and pains bestowed on the making of them. But, as it is, a doubt is left to stand for years, till the cause of some

(*r*) Shep. Touch. 56.

(*s*) Shep. Touch. n. (24), Preston's ed.

(*t*) 2 Black. Com. 306.

(*u*) *Cooch v. Goodman*, 2 Queen's Bench Rep. 580, 597.

(*x*) See *Taunton v. Pepler*, 6

Madd. 166, 167 ; *Aveline v. Whisson*, 4 Man. & Gran. 801 ; *Cherry*

v. Heming, 4 Ex. 631, 636 ;

Laurie v. Lees, 14 Ch. D. 249 ; 7 App. Cas. 19, 27.

unlucky suitor raises the point before one of the Courts ; till this happens, the judges themselves have no authority to remove it ; and thus it remains a pest to society, till caught in the act of raising a lawsuit. No wonder then, when judges can do so little, that writers should avoid all doubtful points. Cases, which have been decided, are continually cited to illustrate the principles on which the decisions have proceeded ; but in the absence of decision, a lawyer becomes timid, and seldom ventures to draw an inference, lest he should be charged with introducing a doubt.

To return : a feoffment, with livery of seisin, though once the usual method of conveyance, has long since ceased to be generally employed. For many years past, another method of conveyance has been resorted to, which could be made use of at any distance from the property ; but as this mode derived its effect from the Statute of Uses (*y*), it will be necessary to explain that statute before proceeding further.

(*y*) 27 Hen. VIII. c. 10.

CHAPTER VIII.

OF USES AND TRUSTS.

Anciently a gift with livery of seisin was all that was necessary for a conveyance.

In equity a different rule prevailed.

PREVIOUSLY to the reign of Henry VIII., when the Statute of Uses (*a*) was passed, a simple gift of lands to a person and his heirs, accompanied by livery of seisin, was all that was necessary to convey to that person an estate in fee simple in the lands. The Courts of law did not deem any consideration necessary; but if a man voluntarily gave lands to another, and put him in possession of them, they held the gift to be complete and irrevocable; just as a gift of money or goods, made without any consideration, is, and has ever been, quite beyond the power of the giver to retract it, if accompanied by delivery of possession (*b*). In law, therefore, the person to whom a gift of lands was made, and seisin delivered, was considered thenceforth to be the true owner of the lands. In equity, however, this was not always the case; for the Court of Chancery, administering equity, held that the mere delivery of the possession or seisin by one person to another was not at all conclusive of the right of the feoffee to enjoy the lands of which he was enfeoffed. Equity was unable to take from him the title which he possessed, and could always assert in the Courts of law; but equity could and did compel him to make use of that legal title, for the benefit of any other person who might have a more righteous claim to the beneficial enjoyment. Thus if a feoffment was made of lands to one person for the benefit or to the use of another, such person was bound in conscience to hold the lands to the use or for the benefit

(*a*) 27 Hen. VIII. c. 10.

(*b*) 2 Black. Com. 441.

of the other accordingly; so that while the title of the person enfeoffed was good in a Court of law, yet he derived no benefit from the gift, for the Court of Chancery obliged him to hold entirely for the use of the other for whose benefit the gift was made. This device was introduced into England about the close of the reign of Edward III. by the foreign ecclesiastics, who contrived by means of it to evade the Statutes of Mortmain, by which lands were prohibited from being given for religious purposes: for they obtained grants to persons *to the use of* the religious houses; which grants the clerical chancellors of those days held to be binding (c). In process of time, such feoffments to one person to the use of another became very common; for the Court of Chancery allowed the *use* of lands to be disposed of in a variety of ways, amongst others by will (d), in which a disposition could not then be made of the lands themselves. Sometimes persons made feoffments of lands to others to the use of themselves the feoffors; and when a person made a feoffment to a stranger, without any consideration being given, and without any declaration being made for whose use the feoffment should be, it was considered in Chancery that it must have been meant by the feoffor to be for his own use (e). So that though the feoffee became *in law* absolutely seised of the lands, yet *in equity* he was held to be seised of them to the use of the feoffor. The Court of Chancery paid no regard to that implied consideration, which the law affixed to every deed on account of its solemnity, but looked only to what actually passed between the parties; so that a feoffment accompanied by a deed, if no consideration actually

Feoffment to
the
feoffor.

(c) 2 Black. Com. 328; 1 Sand. ed.); 2 Black. Com. 329; ante, Uses, 16 (15, 5th ed.); 2 Fon- p. 86.
blanque on Equity, 3.

(d) Perkins, ss. 496, 528, 537; Uses, 61, 5th ed.; Co. Litt. Wright's Tenures, 174; 1 Sand. 271 b.
Uses, 65, 68, 69 (64, 67, 68, 5th

passed, was held to be made *to the use* of the feoffor, just as a feoffment by mere parol or word of mouth. If however there was any, even the smallest, consideration given by the feoffee (*f*), such as five shillings, the presumption that the feoffment was for the use of the feoffor was rebutted, and the feoffee was held entitled to his own use.

The Statute
of Uses.

Transactions of this kind became in time so frequent that most of the lands in the kingdom were conveyed to uses “to the utter subversion of the ancient common laws of this realm” (*g*). The attention of the legislature was from time to time directed to the public inconvenience to which these uses gave rise; and after several attempts to amend them (*h*), an Act of Parliament was at last passed for their abolition. This Act is no other than the Statute of Uses (*i*), a statute which still remains in force, and exerts at the present day a most important influence over the conveyance of real property. By this statute it was enacted, that where any person or persons shall stand seised of any lands or other hereditaments to the use, confidence or trust of any other person or persons, the persons that *have* any such use, confidence or trust (by which was meant the persons beneficially entitled) shall be deemed in lawful seisin and possession of the same lands and hereditaments for such estates as they have in the use, trust or confidence. This statute was the means of effecting a complete revolution in the system of conveyancing. It is a curious instance of the power of an Act of Parliament; it is in fact an enactment that what is given to A. shall, under certain circumstances, not be given to A. at all,

(*f*) 1 Sand. Uses, 62 (61, 5th ed.).

(*g*) Stat. 27 Hen. VIII. c. 10, preamble.

(*h*) See particularly stat. 1 Rich.

III. c. 1, enabling the cestui que use, or person beneficially entitled, to convey the possession without the concurrence of his trustee.

(*i*) 27 Hen. VIII. c. 10.

but to somebody else. For suppose a feoffment be now made to A. and his heirs, and the seisin duly delivered to him; if the feoffment be expressed to be made to him and his heirs *to the use* of some other person, as B. and his heirs, A. (who would, before this statute, have had an estate in fee simple at law) now takes *no permanent estate*, but is made by the statute to be merely a kind of conduit pipe for conveying the estate to B. For B. (who before would have had only a use or trust in equity) shall now, *having the use*, be deemed in lawful seisin and possession; in other words, B. now takes not only the beneficial interest, but also the estate in fee simple at law, which is wrested from A. by force of the statute. Again, suppose a feoffment to be now made simply *to A. and his heirs* without any consideration. We have seen that before the statute the feoffor would in this case have been held in equity to have the use, for want of any consideration to pass it to the feoffee; now, therefore, the feoffor, having the use, shall be deemed in lawful seisin and possession; and consequently, by such a feoffment, although livery of seisin be duly made to A., yet no permanent estate will pass to him; for the moment he obtains the estate he holds it to the use of the feoffor; and the same instant comes the statute, and gives to the feoffor, who has the use, the seisin and possession (*k*). The feoffor, therefore, instantly gets back all that he gave; and the use is said to *result* to himself. If, however, the feoffment be made *unto and to the use* of A. and his heirs—as, before the statute, A. would have been entitled for his own use, so now he shall be deemed in lawful seisin and possession, and an estate in fee simple will effectually pass to him accordingly. The propriety of inserting, in every feoffment, the words *to the use of*, as well as *to the feoffee*, is therefore manifest. It appears also that

Feoffment to A. and his heirs *to the use* of B. and his heirs.

Feoffment without consideration.

Resulting use.

(*k*) 1 Sand. Uses, 99, 100 (95, 5th ed.).

an estate in fee simple may be effectually conveyed to a person by making a feoffment to any other person and his heirs, to the use of or upon confidence or trust for such former person and his heirs. Thus, if a feoffment be made to A. and his heirs, to the use of B. and his heirs, an estate in fee simple will now pass to B., as effectually as if the feoffment had been made directly unto and to the use of B. and his heirs in the first instance. The words *to the use of* are now almost universally employed for such a purpose; but “upon confidence,” or “upon trust for,” would answer as well, since all these expressions are mentioned in the statute.

Trusts.

Trusts still

Statute of
Uses.

The word *trust*, however, is never employed in modern conveyancing, when it is intended to vest an estate in fee simple in any person by force of the Statute of Uses. Such an intention is always carried into effect by the employment of the word *use*; and the word *trust* is reserved to signify a holding by one person for the benefit of another similar to that (*l*), which, before the statute, was called a *use*. For, strange as it may appear, with the Statute of Uses remaining unrepealed, lands are still, as everybody knows, frequently vested in trustees, who have the seisin and possession in law, but yet have no beneficial interest, being liable to be brought to account for the rents and profits by means of the equitable jurisdiction of the High Court of Justice. The Statute of Uses was evidently intended to abolish altogether the jurisdiction of the Court of Chancery over landed estates (*m*), by giving actual possession at law to every person beneficially entitled in equity. But this object has not been accomplished; for the Court of Chancery soon regained in a curious manner its former ascendancy, which has remained to the present day. So that all

(*l*) But not the same, 1 Sand. Uses, 266 (278, 5th ed.).

(*m*) *Chudleigh's case*, 1 Rep. 124, 125.

that was ultimately effected by the Statute of Uses, was to import into the rules of law some of the then existing doctrines of the Courts of Equity (*n*), and to add three words, *to the use*, to every conveyance (*o*).

The Supreme Court of Judicature Act, 1873 (*p*), transferred (*q*) the jurisdiction of all the Courts, both of law and equity, to the High Court of Justice thereby established; and it enacts (*r*) that in all matters, not therein particularly mentioned, in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail.

Supreme
Court of
Judicature
Act.

Rules of
equity now to

The manner in which the Court of Chancery regained its ascendancy was as follows:—Soon after the passing of the Statute of Uses, a doctrine was laid down, that there could not be a use upon a use (*s*).

For instance, suppose a feoffment had been made to A. and his heirs, to the use of B. and his heirs, to the use of C. and his heirs; the doctrine was, that the use to C. and his heirs was a use upon a use, and was therefore not affected by the Statute of Uses, which could only *execute* or operate on the use to B. and his heirs. So that B. and not C. became entitled, under such a feoffment, to an estate in fee simple in the lands comprised in the feoffment. This doctrine has much of the subtlety of the scholastic logic which was then prevalent. As Mr. Watkins says (*t*), it must have surprised every one, who was not sufficiently learned to have lost his common sense. It was however adopted by the Courts and is still law. Even if the first use be to the

No use upon
a use.

(*n*) 2 Fonb. Eq. 17.

(*o*) See *Hopkins v. Hopkins*, 1 Atk. 591; 1 Sand. Uses, 265 (277, 5th ed.).

(*p*) Stat. 36 & 37 Vict. c. 66, ss. 16—18; this Act came into operation on the 1st November,

1875; see stat. 37 & 38 Vict. c. 83.

(*q*) Sects. 16, 17, 18.

(*r*) Sect. 25, subsect. (11).

(*s*) 2 Black. Com. 345.

(*t*) Principles of Conveyancing, Introduction.

Chancery in-
terfered.

feoffee himself, in which case he takes by the common law (*u*), no subsequent use will be *executed*, and the feoffee will take the fee simple; thus, under a feoffment unto and to the use of A. and his heirs, to the use of C. and his heirs, C. takes no estate in law, for the use to him is a use upon a use; but the fee simple vests in A. to whom the use is first declared (*v*). Here then was at once an opportunity for the Court of Chancery to interfere. It was manifestly inequitable that C., the party to whom the use was last declared, should be deprived of the estate, which was intended solely for his benefit; the Court of Chancery, therefore, interposed on his behalf, and constrained the party, to whom the law had given the estate, to hold in *trust* for him to whom the use was last declared. Thus arose the modern doctrine of uses and trusts. And hence it is, that by the modern method of vesting a freehold estate in one person as trustee for another, the conveyance is made unto the trustee, or some other person (it is immaterial which), and his heirs, *to the use* of the trustee and his heirs, *in trust* for the party intended to be benefited (called *cestui que trust*) and his heirs. In a deed executed after the 31st December, 1881, the limitation may be unto and *to the use* of the trustee in fee simple, *in trust* for the *cestui que trust* in fee simple without the use of the word *heirs* (*w*). An estate in fee simple is thus vested in the trustee, by force of the Statute of Uses, and the entire beneficial interest is given over to the *cestui que trust* by the doctrines of the Court of Chancery. The estate in fee simple, which is vested in the trustee, is called the *legal estate*, being an estate, to which the trustee was entitled, only in the contemplation of a court of *law*, as distinguished from equity. The

Legal estate.

(*u*) *Doe d. Lloyd v. Passingham*,
6 Barn. & Cres. 305, 317; *Orme's*
case, L. R., 8 C. P. 281.

(*v*) *Doe d. Lloyd v. Passingham*,
ubi supra.

(*w*) Stat. 44 & 45 Vict. c. 41,
s. 51; ante, p. 175.

interest of the *cestui que trust* is called an *equitable estate*, being an estate to which he was entitled only in the contemplation of the Court of Chancery, which administered *equity*. The Supreme Court of Judicature Act, 1873, has assigned to the Chancery Division of the High Court the execution of trusts, charitable and private (*x*); but the doctrine of trusts remains the same. In the present instance the *cestui que trust* has an equitable estate in fee simple. He is the beneficial owner of the property. The trustee, by virtue of his legal estate, has the right and power to receive the rents and profits; but the *cestui que trust* is able, by virtue of his estate in equity, at any time to oblige his trustee to come to an account, and hand over the whole of the proceeds (*y*).

Equitable
estate.

(*x*) Stat. 36 & 37 Vict. c. 66, s. 34.

(*y*) There is a very important difference between the right of a trustee of land or other property and the right of the *cestui que trust*. A trustee of land has the legal estate therein; and this, as we have seen, is a right availing against all the world. But the right of the *cestui que trust* is only a right availing a particular person, namely the trustee. The Court of Chancery enforced a trust imposed on the legal owner of property by proceedings against the person of the trustee. Equity acts *in personam*, as it was said. If the original trustee parted with his legal estate in or ownership of the trust property, any person who acquired that estate or ownership from the trustee, with actual or constructive notice of the trust, was in equity bound by the trust; that is, the Courts of Equity would continue to enforce the trust against the person who succeeded to the trustee's legal rights. And it came to be established that the obligation imposed by a trust was so far annexed to the trustee's estate that, as a general rule, all persons who acquired that estate were bound by the trust. If, however, the trustee parted with the trust property to a *bonâ fide* purchaser for valuable consideration, who had no notice of the trust, the *cestui que trust* could not recover the property by any proceeding either at law or in equity, and had no remedy except to try to obtain compensation by suing the trustee in equity for a breach of trust. It is this exception to the general rule respecting the devolution of the obligation created by a trust which shows most clearly the nature of the right of a *cestui que trust*. The difference between the rights of trustee and *cestui que trust* was formerly emphasised by the fact that the right of the *cestui que trust* was not recognized in the Courts of

Difference
between the
rights of
trustee and
trust.

Notice of a
trust.

Estates in equity.

Modern Chancery different to ancient.

Equitable rights.

Legal rights.

We have now arrived at a very prevalent and important kind of interest in landed property, namely, an estate in equity merely, and not at law. The owner of such an estate had no title at all in any court of law, but was obliged to have recourse exclusively to the Court of Chancery, where he found himself considered as owner, according to the equitable estate he might have had. Chancery in modern times, though in principle the same as the ancient court which first gave effect to uses, was yet widely different in the application of

Common Law, and could only be enforced in a Court of Equity. In the year 1875 the original jurisdiction of all the Courts of Common Law and Equity was transferred to the High Court of Justice. The effect of this change is that *equitable rights*, or rights enforced by virtue of the jurisdiction of Courts of Equity, are now recognized and may be enforced in every branch of the High Court of Justice just as much as *legal rights*, or rights enforced by virtue of the jurisdiction of Courts of Common Law; although, for the purposes of procedure, the execution of trusts and various other branches of equity are assigned to the Chancery Division. But the two systems of law and equity are not abolished, as some have imagined. They continue to be administered, though now in the same Court instead of in different Courts. In the High Court of Justice the same prevalence is still secured for equitable rights over legal, as was formerly obtained by the action of the Court of Chancery against those persons, who exercised their legal rights in violation of the rules of equity. Nevertheless every essential difference between legal and equitable rights is still recognized by the Court, in which they are now enforced; and the nature of the respective rights of trustee and *cestui que trust* remains the same as before. As a rule, however, a *cestui que trust* is enabled to secure for himself the practical advantages of ownership by means of his equitable right against the trustee personally. In Courts of Equity, moreover, the *cestui que trust* was always treated as the owner of the trust property, *as against all persons bound by the trust*; and he is so regarded still in our present Courts. Hence the right of a *cestui que trust* with regard to the trust property is spoken of as an *equitable estate* or *equitable interest* therein, and is contrasted with the legal estate or right of ownership which resides in the trustee. For the same reason equitable estates in land are included among the rights called real property, although the right of a *cestui que trust* is of an entirely different nature to the rights, which could be enforced in real actions. See ante, note (c) to p. 14, and p. 191; Lewin on Trusts, Introduction, and Chaps. I., XII. sect. 3, pp. 1, 13, 215, 6th ed.; Williams's Conveyancing Statutes, 386—388; *Clements v. Matthews*, 11 Q. B. D. 808; *Joseph v. Lyons*, 33 W. R. 145.—EDITOR'S NOTE.

many of its rules. Thus we have seen (z) that a consideration, however trifling, given by a feoffee, was sufficient to entitle him to the *use* of the lands of which he was enfeoffed. But the absence of such a consideration caused the use to remain with, or more technically to result to, the feoffor, according to the rules of Chancery in ancient times. And this doctrine has now a practical bearing on the transfer of legal estates; the ancient doctrines of Chancery having, by the Statute of Uses, become the means of determining the owner of the legal estate, whenever USES are mentioned. But the modern Court of Chancery took a wider scope, and would not withhold or grant its aid, according to the mere payment or non-payment of five shillings: thus, circumstances of fraud, mistake, or the like, may induce the High Court, in the exercise of the equitable jurisdiction transferred thereto from the Court of Chancery, to require a grantee under a voluntary conveyance to hold merely as a trustee for the grantor; but the mere want of a valuable consideration would not now be considered a sufficient cause for its interference

By the Act to confer on the County Courts a limited jurisdiction in equity, it was enacted, amongst other things, that these Courts should have and exercise all the power and authority of the High Court of Chancery in all suits for the execution of trusts in which the trust estate or fund should not exceed in amount or value the sum of five hundred pounds (b). This Act came into operation on the 1st of October, 1865 (c).

County
Courts.

In the construction and regulation of trusts, equity is said to follow the law, that is, the Court of Chancery

Equity fol-
lows the law

(z) Ante, p. 188.

(a) 1 Sand. Uses, 334 (365, 5th ed.).

(b) Stat. 28 & 29 Vict. c. 99, s. 1, amended by stat. 30 & 31 Vict. c. 142.

(c) Sect. 23.

Equitable
estates for
life and in
tail.

generally adopted the rules of law applicable to legal estates (*d*) ; thus, a trust for A. for his life, or for him and the heirs of his body, or for him and his heirs, or for him in tail or in fee simple in a deed executed after the 31st December, 1881 (*e*), will give him an equitable estate for life, in tail, or in fee simple, as the case may be. An equitable estate tail may also be *barred*, in the same manner as an estate tail at law, and cannot be disposed of by any other means. But the decisions of equity, though given by rule, and not at random, do not follow the law in all its ancient technicalities, but proceed on a liberal system, correspondent with the more modern origin of its power. Thus, equitable estates in tail, or in fee simple, may be conferred without the use of the words *heirs of the body*, or *heirs*, or other words necessary to limit a legal estate of inheritance, if the intention be clear : for, equity pre-eminently regards the intentions and agreements of parties ; accordingly, words which at law would confer an estate tail, are sometimes construed in equity, in order to further the intention of the parties, as giving merely an estate for life, followed by separate and independent estates tail to the children of the donee. This construction is frequently adopted by equity in the case of marriage articles, where an intention to provide for the children might otherwise be defeated by vesting an estate tail in one of the parents, who could at once bar the entail, and thus deprive the children of all benefit (*f*). So if lands be directed to be sold, and the money to arise from the sale be directed to be laid out in the purchase of other land to be settled on certain persons for life or in tail, or in any other manner, such persons will be regarded in equity as already in possession of the estates

Equitable
estate tail in
lands to be
purchased.

1 Sand. Uses, 269 (280, 5th ed.).

(*e*) Stat. 44 & 45 Vict. c. 41, s. 51 ; ante, p. 175.

(*f*) 1 Sand. Uses, 311 (337, 5th ed.) ; Watkins on Descents, 168 (214, 4th ed.).

they are intended to have: for, whatever is fully agreed to be done, equity considers as actually accomplished. And in the same manner if money, from whatever source arising, be directed to be laid out in the purchase of land to be settled in any manner, equity will regard the persons on whom the lands are to be settled as already in the possession of their estates (*g*). And in both the above cases the estates tail directed to be settled may be barred, before they are actually given, by a disposition, duly enrolled, of the lands which are to be sold in the one case, or of the money to be laid out in the other (*h*). Again, an equitable estate in fee simple immediately belongs to every purchaser of freehold property the moment he has signed a contract for purchase, provided the vendor has a good title (*i*); and it is understood that the whole estate of the vendor is contracted for, unless a smaller estate is expressly mentioned, the employment of the word *heirs*, or of other technical words, not being essential (*k*). If, therefore, the purchaser were to die intestate the moment after the contract, the equitable estate in fee simple, which he had just acquired, would descend to his heir at law; who would, until the passing of a recent Act which enacts the contrary (*l*), have had a right (to be enforced in equity) to have the estate paid for out of the money and other personal estate of his deceased ancestor; and the vendor would be a trustee for the heir, until he should have made a conveyance of the legal estate, to which the heir would be entitled. Many other examples of equitable or trust estates in fee simple might be furnished.

Equitable
estate in fee

(*g*) 1 Sand. Uses, 300 (324, 5th ed.).

(*h*) Stat. 3 & 4 Will. IV. c. 74, ss. 70, 71, repealing stat. 7 Geo. IV. c. 45, which repealed stat. 39 & 40 Geo. III. c. 56.

(*i*) Sug. Vend. & Pur. 174 et seq., 14th ed.

(*k*) *Bower v. Cooper*, 2 Hare, 408.

(*l*) Stat. 40 & 41 Vict. c. 34.

Formerly, no
escheat of a
trust estate.

Law of
escheat now
applies to
trust estates.

Trust for
alien.

Naturaliza-
tion Act, 1870.

Formerly, an equitable estate in fee did not escheat to the lord upon failure of heirs of the *cestui que trust* (*m*), for a trust is a mere creature of equity, and not a subject of tenure. In such a case, therefore, the trustee held the lands discharged from the trust which had so failed; and accordingly had a right to receive the rents and profits without being called to account by any one. In other words, the lands were thenceforth his own (*n*). But the Intestates Estates Act, 1884 (*o*), now enacts that, from and after the passing of this Act (*p*), where a person dies without an heir and intestate (*q*) in respect of any real estate consisting of any estate or interest, whether legal or equitable in any incorporeal hereditament, or of any equitable estate or interest in any corporeal hereditament, whether devised or not devised to trustees by the will of such person, the law of escheat shall apply in the same manner as if the estate or interest above mentioned were a legal estate in corporeal hereditaments (*r*).

Previously to the Naturalization Act, 1870 (*s*), it was held that if lands were purchased by a natural-born subject in trust for an alien (*t*), the crown might claim the benefit of the purchase (*u*); although if lands were directed to be sold, and the produce given to an alien, the crown had then no claim (*x*). But as we have seen (*y*), the Naturalization Act, 1870, now provides that real and personal property of every description

(*m*) 1 Sand. Uses, 288 (302, 5th ed.).

(*n*) *Burgess v. Wheate*, 1 Wm. Black. 123; 1 Eden, 177; *Taylor v. Haygarth*, 14 Sim. 8; *Davall v. New River Company*, 3 De Gex & Smale, 394; *Beale v. Symonds*, 16 Beav. 406; *Gallard v. Hawkins*, 27 Ch. D. 298.

(*o*) Stat. 47 & 48 Vict. c. 71, s. 4.

(*p*) 14th August, 1884.

(*q*) See sect. 7.

(*r*) See ante, pp. 155—157, and note to (*d*), p. 156.

(*s*) Stat. 33 Vict. c. 14.

(*t*) See ante, p. 87.

(*u*) *Barrow v. Wadkin*, 24 Beav. 1; *Sharp v. St. Sauveur*, L. R., 7 Ch. Ap. 343; overruling *Ritson v. Stordy*, 3 Sm. & Giff. 230.

(*x*) *Du Hourmelin v. Sheldon*, 1 Beav. 79; 4 My. & Cr. 525.

(*y*) Ante, p. 89.

may be taken, acquired, held and disposed of by an alien in the same manner in all respects as by a natural-born British subject; and a title to real and personal property of every description may be derived through, from or in succession to an alien in the same manner in all respects as through, from or in succession to a natural-born British subject (z). In the event of high treason being committed by the *cestui que trust* of an estate in fee simple, it was the better opinion that his equitable estate would be forfeited to the crown (a). But, as we have seen (b), all forfeitures for treason are now abolished (c). By a statute of the present reign (d), both the lord's right of escheat, and the crown's right of forfeiture, had already been taken away in the case of the failure of heirs or corruption of blood of the *trustee*, except so far as he himself might have any beneficial interest in the lands of which he was seised.

Trustees, as we have seen (f), are invariably made joint tenants. So that, if there are more trustees than one, upon the death of one of them the estate in any land subject to the trust vests at once in the surviving trustees or trustee. Formerly, upon the death of a sole or sole surviving trustee of lands, the legal estate therein passed to his devisee or heir at law (g), according as he had or had not devised the same by his will, in each case subject to the trust (h). The devolution of trust estates upon the death of a sole or sole surviving trustee after the 31st December, 1881, is different. For by the Conveyancing and Law of Property Act, 1881 (i),

Descent of
estate of

(z) Stat. 33 Vict. c. 14, s. 2.

(a) 1 Hale, P. C. 249.

(b) Ante, p. 80.

(c) Stat. 33 & 34 Vict. c. 23.

(d) Stat. 13 & 14 Vict. c. 60, repealing stat. 4 & 5 Will. IV. c. 23, to the same effect.

(e) Stat. 13 & 14 Vict. c. 60, s. 47.

(f) Ante, p. 164.

(g) As to the devolution of the estate of a bare trustee between the 7th Aug. 1874, and the 31st Dec. 1881, see Williams's Conveyancing Statutes, 17, 18; ante, p. 141.

(h) See ante, note (y) to p. 193.

(i) Stat. 44 & 45 Vict. c. 41,

where an estate or interest of inheritance, or limited to the heir as special occupant, in any tenements or hereditaments, corporeal or incorporeal, is vested on any trust, in any person solely, the same shall, on his death, *notwithstanding any testamentary disposition*, devolve to and become vested in his personal representatives or representative from time to time, in like manner as if the same were a chattel real vesting in them or him; and accordingly all the like powers for one only of several joint personal representatives, as well as for a single personal representative, and for all the personal representatives together, to dispose of and otherwise deal with the same, shall belong to the deceased's personal representatives or representative from time to time, with all the like incidents, but subject to all the like rights, equities, and obligations, as if the same were a chattel real vesting in them or him; and for the purposes of this enactment, the personal representatives, for the time being, of the deceased are to be deemed in law his heirs and assigns, within the meaning of all trusts and powers.

Descent of an equitable estate.

The descent of an equitable estate on intestacy follows the rules of the descent of legal estates; and, therefore, in the case of gavelkind and borough-English lands, trusts affecting them will descend according to the descendible quality of the tenure (*k*).

Creation and transfer of trust estates. Statute of Frauds.

Trusts or equitable estates may be created and passed from one person to another, without the use of any particular ceremony or form of words (*l*). But, by the Statute of Frauds (*m*), it is enacted (*n*), that no action

s. 30; see Williams's Conveyancing Statutes, 170—176; *Re Pilling's Trusts*, 26 Ch. D. 432.

(*k*) 1 Sand. Uses, 270 (282, 5th

(*l*) 1 Sand. Uses, 315, 316 (343, 344, 5th ed.).

(*m*) 29 Car. II. c. 3.

(*n*) Sect. 4; Sug. V. & P. c. 4, pp. 121 et seq., 14th ed.

shall be brought upon any agreement made upon consideration of marriage, or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized. It is also enacted (*o*), that all declarations or creations of trusts or confidences of any lands, tenements or hereditaments, shall be manifested and proved by some writing, signed by the party who is by law enabled to declare such trusts, or by his last will in writing; and further (*p*), that all grants and assignments of any trust or confidence shall likewise be in writing, signed by the party granting or assigning the same, or by his last will. Trusts arising or resulting from any conveyance of lands or tenements, by implication or construction of law, and trusts transferred or extinguished by an act or operation of law, are exempted from this statute (*q*). In the transfer of equitable estates it is usual, in practice, to adopt conveyances applicable to the legal estate; but this is never necessary (*r*). If writing is used, and duly signed, in order to satisfy the Statute of Frauds, and the intention to transfer is clear, any words will answer the purpose (*s*). It may be mentioned that any person,

Equitable
tenant for life.

(*o*) Sect. 7; *Tierney v. Wood*, 19 Beav. 330; *Dye v. Dye*, 13 Q. B. D. 147.

(*p*) Sect. 9.

(*q*) 29 Car. II. c. 3, s. 8.

(*r*) 1 Sand. Uses, 342 (377, 5th

(*s*) Agreements, the matter whereof is of the value of five pounds or upwards, now bear a stamp duty of sixpence, which may be denoted by an adhesive stamp, which is to be cancelled by

the person by whom the agreement is first executed. Stat. 33 & 34 Vict. c. 97, s. 36. The stamp is cancelled by writing on or across the stamp the name or initials of the person required by law to cancel the same, or the name or initials of his firm, together with the true date of his so writing. Stat. 33 & 34 Vict. c. 97, s. 24. Declarations of trust of any property made by any writing not being a deed or will, or an instru-

who is beneficially entitled in possession to an equitable estate for his life, now has the powers of leasing, sale and other powers given to a tenant for life by the Settled Land Act, 1882 (*t*).

Sale of land
by auction.

The sale of real estate by auction is now regulated by an Act which renders invalid every such sale where a puffer is employed ; and which requires that the particulars or conditions of sale shall state whether the sale is without reserve, or subject to a reserved price, or whether a right to bid is reserved. And if the sale is stated to be without reserve or to that effect, the seller may not employ any person to bid at the sale, and the auctioneer may not knowingly take any bidding from any such person. But where the sale is declared to be subject to a right for the seller to bid, he or any one person on his behalf may bid at the auction in such manner as he may think proper (*u*). This Act also very properly abolishes a practice which had long prevailed in Courts of Chancery of opening the biddings after a sale by auction of land under their authority, if a price considerably higher were afterwards offered ; so that a *bonâ fide* purchaser was never sure of his bargain. But now the highest *bonâ fide* bidder is to be declared and allowed the purchaser, except in the case of fraud or improper conduct in the management of the sale (*x*).

Opening of
biddings
abolished.

Where time
not of essence
in Equity, not
to be of
essence in any
Courts.

Courts of Equity, looking to the substance of contracts rather than to the letter, have been in the habit of enforcing their performance, in some cases where the time fixed has gone by, and the contract has therefore, according to the letter of the law, come to an end.

ment chargeable with ad valorem duty, bear the same duty as ordinary deeds. Stat. 33 & 34 Vict. c. 97, schedule ; ante, p. 181.

(*t*) Stat. 45 & 46 Vict. c. 38,

s. 2, sub-ss. 5, 10 (i) ; see ante, pp. 35—38, 43—47, 49—54.

(*u*) Stat. 30 & 31 Vict. c. 48, ss. 4, 5, 6.

b. 7.

The Supreme Court of Judicature Act, 1873 (*y*), which transferred to the Court thereby established the jurisdiction of the superior Courts both of law and equity, accordingly provides (*z*), that stipulations in contracts, as to time or otherwise, which would not, before the commencement of that Act, have been deemed to be, or to have become, of the essence of such contracts in a Court of Equity, shall receive in all Courts the same construction and effect as they would have theretofore received in equity.

The County Courts have now jurisdiction in equity County Courts in all suits for specific performance of, or for reforming, delivering up or cancelling of, any agreement for the sale, purchase or lease of any property, where, in the case of a sale or purchase, the purchase-money, or in case of a lease the value of the property, shall not exceed five hundred pounds (*a*).

Trust estates, besides being subject to voluntary Trust estates alienation, are also liable, like estates at law, to involuntary alienation for the payment of the owner's debts. By the Statute of Frauds it was provided, that if any *cestui que trust* should die, leaving a trust in fee simple to descend to his heir, such trust should be assets by descent, and the heir should be chargeable with the obligation of his ancestors for and by reason of such assets, as fully as he might have been if the estate in law had descended to him in possession in like manner as the trust descended (*b*). And the subsequent statutes

The Statute of Frauds.

Subsequent statutes.

(*y*) Stat. 36 & 37 Vict. c. 66.

(*z*) Sect. 25, subsect. (7), amended by stat. 38 & 39 Vict. c. 77, s. 10.

(*a*) Stat. 30 & 31 Vict. c. 142, s. 9.

(*b*) Stat. 29 Car. II. c. 3, s. 10. Before this provision the Court of

Chancery had refused to give the bond creditor any relief. *Bennet v. Box*, 1 Ch. Ca. 12; *Prat v. Colt*, ib. 128. These decisions, in all probability, gave rise to the above enactment. See 1 Wm. Black. 159; 1 Sand. Uses, 276 (289, 5th ed.).

to which we have before referred, for preventing the debtor from defeating his bond creditor by his will, and for rendering the estates of all persons liable on their decease to the payment of their just debts of every kind, apply as well to equitable or trust estates as to estates at law (*c*).

Judgment
debts.
The Statute
of Frauds.

The same Statute of Frauds also gave a remedy to the creditor who had obtained a *judgment* against his debtor, by providing (*d*), that it should be lawful for every sheriff or other officer to whom any writ should be directed, upon any judgment, to deliver execution unto the party in that behalf suing, of all such lands and hereditaments as any other person or persons should be seised or possessed of *in trust for him against whom execution was sued*, like as the sheriff or other officer might have done if the party against whom execution should be sued had been seised of such lands or hereditaments of such estate as they be seised of in trust for him *at the time of execution sued*. This enactment was evidently copied from a similar provision made by a statute of Henry VII. (*e*), respecting lands of which any other person or persons were seised *to the use* of him against whom execution was sued; and which statute of course became inoperative when uses were, by the Statute of Uses (*f*), turned into estates at law. The construction placed upon this enactment of the Statute of Frauds was more favourable to purchasers than that placed on the statute of Edward I. (*g*), by which fee simple estates at law were first rendered liable to judgment debts. For it was held that although the trustee

(*c*) Stat. 3 Wm. & Mary, c. 14, s. 2; 47 Geo. III. c. 74; 11 Geo. IV. & 1 Will. IV. c. 47; 3 & 4 Will. IV. c. 104; 32 & 33 Vict. c. 46; 46 & 47 Vict. c. 52, s. 125; ante, pp. 105—107.

(*d*) Stat. 29 Car. II. c. 3, s. 10.
(*e*) Stat. 19 Hen. VII. c. 15.
(*f*) Stat. 27 Hen. VIII. c. 10.
(*g*) Stat. 13 Edw. I. c. 18; ante, p. 109.

might have been seised in trust for the debtor at the time of obtaining the judgment, yet if he had conveyed away the lands to a purchaser before execution was actually sued out on the judgment, the lands could not afterwards be taken; because the trustee was not, in the words of the statute, seised in trust for the debtor *at the time of execution sued* (*h*). The Act for extending the remedies of creditors against the property of debtors (*i*), however, deprived purchasers of this advantage, in consideration perhaps of the greater facilities which it afforded in the search for judgments; for it provided (*k*), that execution might be delivered, under the writ of *elegit*, of all such lands and hereditaments as the person against whom execution was sued, *or any person in trust for him, should have been* seised or possessed of at the time of entering up the judgment, *or at any time afterwards*; and a remedy in equity was also given to the judgment creditor against all lands and hereditaments of or to which the debtor should at the time of entering up the judgment, or at any time afterwards, be seised, possessed or entitled for any estate or interest whatever at law or in equity (*l*). But the still more recent enactments (*m*), to which we have before referred (*n*), have greatly diminished the effect of these provisions. New enactments.

Trust estates are subject to debts due to the crown Crown debts. in the same manner and to the same extent as estates at law (*o*). They are also equally liable to involuntary Bankruptcy. alienation on the bankruptcy of the *cestui que trust*. But, on the bankruptcy of the trustee, the legal estate

(*h*) *Hunt v. Coles*, Com. 226; *Harris v. Pugh*, 4 Bing. 335; 12 J. B. Moore, 577.

(*i*) Stat. 1 & 2 Vict. c. 110; ante, p. 110.

(*k*) Sect. 11.

(*l*) Sect. 13.

(*m*) Stats. 2 & 3 Vict. c. 11, s. 5; 23 & 24 Vict. c. 38, ss. 1, 2; 27 & 28 Vict. c. 112.

(*n*) Ante, pp. 111—114.

(*o*) *King v. Smith*, Sug. Vend. & Pur., Appendix, No. 15, p. 1098, 11th ed.

in the premises of which he is trustee remains vested in him and does not pass to the trustee for his creditors (*p*); and the same rule formerly applied to cases of insolvency

The Trustee
Act, 1850.

The circumstance of property being vested in trustees sometimes occasions inconvenience. A trustee may become lunatic, or may leave the country, or may refuse to convey, when required, the lands of which he is trustee. In order to remedy the inconvenience thus occasioned to the persons beneficially entitled, it is provided by Acts of Parliament of the present reign (*r*) that, in the case of a lunatic trustee, the Lord Chancellor, or the judges entrusted by the Queen's sign manual with the care of the persons and estates of lunatics, and the Chancery Division of the High Court

Vesting order. in other cases, may make an order vesting the lands in any other person or persons; and such an order will operate as a valid conveyance of such lands accordingly.

New trustees. It is also provided that, whenever it is expedient to appoint a new trustee, and it is inexpedient, difficult, or impracticable to do so without the assistance of the Court, the Court may make an order appointing a new trustee or new trustees, either in substitution for or in addition to any existing trustee or trustees (*s*), or whether there be any existing trustee or not (*t*). The Court is also empowered to appoint a new trustee in the place of any trustee who shall have been convicted of felony (*u*), or adjudged bankrupt (*v*). And upon making any order

(*p*) Stat. 46 & 47 Vict. c. 52, ss. 20, 44, 168; see Williams on Personal Property, 224, 232—234.

(*q*) *Sims v. Thomas*, 12 Ad. & El. 536.

(*r*) Stats. 13 & 14 Vict. c. 60, and 15 & 16 Vict. c. 55, repealing and consolidating stats. 11 Geo. IV. & 1 Will. IV. c. 60; 4 & 5 Will. IV. c. 23, and 1 & 2 Vict.

c. 69. See also stats. 36 & 37 Vict. c. 66, and 38 & 39 Vict. c. 77, s. 7.

(*s*) Stat. 13 & 14 Vict. c. 60, s. 32.

(*t*) Stat. 15 & 16 Vict. c. 55, s. 9.

(*u*) Sect. 8.

(*v*) Stat. 46 & 47 Vict. c. 52, s. 147.

appointing a new trustee, the Court may direct that any lands subject to the trust shall vest in the person or persons who, upon the appointment, shall be the trustee or trustees for such estate as the Court shall direct; and such order will have the same effect as if the person or persons who before such order were the trustee or trustees (if any) had duly executed all proper conveyances of such lands (*x*). Property held in trust for charities may also be vested by the Court in new trustees, or in the official trustee of charity lands, without any conveyance (*y*). But every such order is now chargeable with a stamp duty of 10s. (*z*). Every trustee appointed by the Court has, as well before as after the trust property becomes vested in him, the same powers, authorities and discretions, and may in all respects act, as if he had been originally appointed a trustee by the instrument, if any, creating the trust (*a*). All the power and authority of the Court, in any of the above-mentioned matters, is now vested in the County Courts, in all proceedings in which the trust estate or fund to which the proceeding relates shall not exceed in amount or value the sum of five hundred pounds (*b*). By another Act of Parliament (*c*) provision is made for vesting the property of congregations or societies for purposes of religious worship or education in new trustees from time to time without any conveyance. The provisions of this Act have recently been extended to Literary and Scientific Institutions (*d*); and also to burial grounds (*e*). The Act to facilitate the incorpora-

Vesting
orders.Charity pro-
perty.County
Courts.

Property held

Literary and
Scientific

Burial

Stat. 13 & 14 Vict. c. 60,
s. 34.

(*y*) Stat. 13 & 14 Vict. c. 60,
s. 45. Stats. 16 & 17 Vict. c. 137,
s. 48; 18 & 19 Vict. c. 124, s. 15;
23 & 24 Vict. c. 136; 25 & 26 Vict.
c. 112; 32 & 33 Vict. c. 110.

(*z*) Stat. 33 & 34 Vict. c. 97,
s. 78.

(*a*) Stat. 44 & 45 Vict. c. 41,
s. 33; see Williams's Convey-
ancing Statutes, 180, 181.

(*b*) Stat. 28 & 29 Vict. c. 99,
s. 1.

(*c*) Stat. 13 & 14 Vict. c. 28.

(*d*) Stat. 17 & 18 Vict. c. 112,
s. 12.

(*e*) Stat. 32 & 33 Vict. c. 36.

tion of trustees of charities for religious, educational, literary, scientific and public charitable purposes has already been referred to (*f*).

Statutory
power to
appoint new
trustees.

In the year 1860 an Act, commonly called "Lord Cranworth's Act," was passed, which contained general provisions for the appointment of new trustees, similar to the powers for that purpose before ordinarily inserted in well-drawn trust deeds (*g*). These provisions extended only to instruments executed, or wills confirmed or revived by codicil executed after the 28th of August, 1860, the date of the Act (*h*). They were repealed from after the 31st of December, 1881, by the Conveyancing and Law of Property Act, 1881 (*i*), which has substituted provisions for the appointment of new trustees applicable to trusts created *either before or after* its commencement (*k*). These enactments, however, only apply if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust; and they have effect subject to the terms of that instrument and to any provisions contained therein (*l*). By the 31st section of the Act (*m*), where a trustee is dead, or remains out of the united kingdom for more than twelve months, or desires to be discharged from the trusts or powers reposed in or conferred on him, or refuses or is unfit to act therein, or is incapable of acting therein, then the person or persons nominated for this purpose by the instrument, if any, creating the trust, or if there is no such person, or no such person able and willing to act, then the surviving or continuing trustees or trustee (*n*) for the time being, or the

(*f*) Stat. 35 & 36 Vict. c. 24; s. 71.

ante, p. 101.

(*g*) Stat. 23 & 24 Vict. c. 145, ss. 27, 28; see Williams's Conveyancing Statutes, 177.

(*h*) Sect. 34.

(*i*) Stat. 44 & 45 Vict. c. 41,

(*k*) Sect. 31, subs. (8).

(*l*) Sect. 31, subs. (7).

(*m*) Sect. 31, subs. (1); see Williams's Conveyancing Statutes, 177 et seq.

(*n*) The provisions of this sec-

personal representatives of the last surviving or continuing trustee, may, by writing, appoint a new trustee or new trustees. Every new trustee so appointed has, as well before as after all the trust property becomes by law, or by assurance, or otherwise, vested in him, the same powers, authorities and discretions, and may in all respects act, as if he had been originally appointed a trustee by the instrument, if any, creating the trust (*o*). On an appointment of a new trustee, the number of trustees may be increased (*p*). It is not obligatory to appoint more than one new trustee, where only one trustee was originally appointed, or to fill up the original number of trustees, where more than two trustees were originally appointed; but, except where only one trustee was originally appointed, a trustee will not be discharged under the 31st section of the Act from his trust unless there will be at least two trustees to perform the trust (*q*). Under this section a new trustee may be appointed in the place of a person nominated trustee in a will who dies before the testator (*r*).

By the 32nd section of the same Act, where there are *more than two* trustees, a trustee may retire and be discharged from the trust, without any new trustee being appointed in his place, upon his declaring by deed his desire to be discharged, and his co-trustees, and such other person, if any, as may be empowered to appoint trustees, consenting by deed to his discharge. It was not the practice of conveyancers, previously to this enactment, to insert any provision of a similar nature into trust deeds (*s*). This section, however, applies to trusts created either before or after the

Retirement
of trustee.

tion relative to a continuing trustee include a refusing or retiring trustee, if willing to act in the execution of the same; 44 & 45 Vict. c. 41, s. 31, subs. (6).

(*o*) Sect. 31, subs. (5).

W.R.P.

(*p*) Sect. 31, subs. (2).

(*q*) Sect. 31, subs. (3).

(*r*) Sect. 31, subs. (6).

(*s*) See Williams's Conveyancing Statutes, 180.

commencement of the Act (*t*), but only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust: and it has effect subject to the terms of that instrument, and to any provisions contained therein (*u*).

Conveyance
of trustees'
estate.

May be now
made simply
by a declara-

When a new trustee was appointed, it was formerly necessary for the persons who were trustees when the appointment was made, to execute a conveyance of their estate in any land subject to the trust to the new trustee and the continuing trustees (*x*). The conveyance was made sometimes by the same deed by which the new trustee was appointed, sometimes by a separate deed. In deeds of appointment of a new trustee and of discharge of a retiring trustee executed after the 31st of December, 1881, the estate in any land subject to the trust may be vested in the future trustees simply by a declaration to that effect made by the proper persons without any conveyance (*y*). For, by the Conveyancing and Law of Property Act, 1881 (*z*), where a deed by which a new trustee is appointed contains a declaration *by the appointor* to the effect that any estate or interest in any land subject to the trust shall vest in the persons who by virtue of the deed become and are the trustees for performing the trust, that declaration shall, without any conveyance, operate to vest that estate or interest in those persons as joint tenants and for the purposes of the trust. And where a deed, by which a retiring trustee is discharged under the same Act, contains a similar declaration *by the retiring and continuing trustees, and by the other person, if*

(*t*) Sect. 32, subs. (4).

(*u*) Sect. 32, subs. (3).

(*x*) Except in cases where the estate could be vested by order of the Court; see ante, p. 207; Williams's Conveyancing Sta-

tutes, 181, 182.

(*y*) Stat. 44 & 45 Vict. c. 41, s. 34, subs. (5); see Williams's Conveyancing Statutes, 181—185.

(*z*) Sect. 34, subs. (1).

any, empowered to appoint trustees, that declaration shall, without any conveyance, operate to vest in the continuing trustees alone as joint tenants, and for the purposes of the trust, the estate and interest to which the declaration relates (a).

It is now provided that a conveyance or transfer made for effectuating the appointment of a new trustee, is not to be charged with any higher duty than 10s. (b). Stamps on ap-
of
tees.

The concurrent existence of two distinct systems of Law and jurisprudence was a peculiar feature of English Law. On one side of Westminster Hall a man might have succeeded in his suit under circumstances in which he would undoubtedly have been defeated on the other side; for he might have had a title in equity, and not at law (being a *cestui que trust*), or a title at law and not in equity (being merely a trustee). In the former case, though he would have succeeded in a chancery suit, he never would have thought of bringing an action at law; in the latter case, he would have succeeded in an action at law; but equity would have taken care that the fruits should be reaped only by the person beneficially entitled. The equitable title was, therefore, the beneficial one, but if barely equitable, it might have occasioned the expense and delay of a chancery suit to maintain it.

A step was taken towards the amalgamation of law and equity by the Common Law Procedure Act, 1854 (c), Common Law
Procedure

(a) Stat. 44 & 45 Vict. c. 41, s. 34, subs. (2). The 34th section does not extend to any legal estate or interest in copyhold or customary land, or to land conveyed by way of mortgage for secur-

ing money subject to the trust; subs. (3).

(b) Stat. 33 & 34 Vict. c. 97, s. 78.

(c) Stat. 17 & 18 Vict. c. 125. The provisions of this Act, stated

which conferred on the Courts of Common Law an extensive equitable jurisdiction. The plaintiff in any action, except replevin and ejectment, was allowed to claim a writ of mandamus commanding the defendant to fulfil any duty in the fulfilment of which the plaintiff was personally interested (*d*), and by the non-performance of which he might have sustained damage (*e*). In all cases of breach of contract or other injury, where the party injured was entitled to maintain and had brought an action, he was allowed to claim a writ of injunction against the repetition or continuance of such breach or injury (*f*). If the defendant would have been entitled to relief against the judgment on equitable grounds, he was allowed to plead, by way of defence to the action, the facts which entitled him to such relief (*g*); and the plaintiff might have replied, in answer to any plea of the defendant's, facts which avoided such plea on equitable grounds (*h*). But the facts pleaded were required to be such as would entitle the person pleading them to absolute and unconditional relief in the Court of Chancery, otherwise the plea would not have been allowed (*i*). The change effected was not therefore so great as might, at first sight, have been supposed.

in the text, were repealed by stat. 46 & 47 Vict. c. 49, saving the jurisdiction thereby established, and reserving the power of making rules of Court as to the matters contained therein.

(*d*) Sect. 68.

(*e*) Sect. 69.

(*f*) Sect. 79. By the Rules of the Supreme Court, 1883 (Order L., Rule 11), no writ of injunction shall be issued. An injunction shall be by a judgment or order, and any such judgment or order shall have the effect which a writ of injunction

previously had.

Stat. 17 & 18 Vict. c. 125, s. 83.

(*h*) Sect. 85.

(*i*) *Mines Royal Societies v. Magnay*, 10 Exch. 489; *Woodhouse v. Farebrother*, 5 E. & B. 277; *Wood v. Copper Miners' Company*, 17 C. B. 561; *Flight v. Gray*, 3 C. B., N. S. 320; *Gee v. Smart*, 8 E. & B. 313; *Jeffs v. Day*, Law Rep., 1 Q. B. 872; *Murphy v. Glass*, Law Rep., 2 P. C. 408; *Allen v. Walker*, Law Rep., 5 Exch. 187.

Another Act of Parliament conferred a common law jurisdiction upon the Court of Chancery:—the Chancery Amendment Act, 1858 (*k*), empowered the Court of Chancery to award damages like a Court of Law in all cases of injunction and specific performance (*l*); and the amount of such damages might have been assessed, or any question of fact tried, by a jury before the Court itself (*m*), or by the Court itself without a (*n*).

In the year 1875, the Supreme Court of Judicature Act, 1873 (*o*), to which we have already referred (*p*), amalgamated all the superior courts of law and equity. By this Act, the original jurisdiction of the Court of Chancery and the old Courts of Common Law was vested in the High Court of Justice; and provision was made for the exercise of appellate jurisdiction by the Court of Appeal (*q*). The same Act provides (*r*) that if any plaintiff claims to be entitled to any equitable estate or right, or to relief upon any equitable ground, against any deed, instrument or contract, or against any right, title or claim whatsoever asserted by the defendant, or to any relief founded upon a legal right which theretofore could only have been given by a Court of equity, the Courts respectively, and every judge thereof, shall give to such plaintiff the same relief as ought to have been given by the Court of Chancery in a suit or other proceeding for the same or the like purpose properly

The Chancery

Supreme
Court of
Judicature
Act, 1873.
Plaintiff's
equitable
relief.

(*k*) Stat. 21 & 22 Vict. c. 27, repealed by stat. 46 & 47 Vict. c. 49, saving the jurisdiction thereby established, and reserving the power of making rules of Court as to the matters contained therein; see *Sayers v. Collier*, 28 Ch. D. 103, 107, 108.

(*l*) Sect. 2.

(*m*) Sects. 3, 4.

(*n*) Sect. 5.

(*o*) Stat. 36 & 37 Vict. c. 66, amended by stats. 38 & 39 Vict. c. 77; 39 & 40 Vict. c. 59; 40 Vict. c. 6; 42 & 43 Vict. c. 78; 44 & 45 Vict. c. 68; 47 & 48 Vict. c. 61.

(*p*) Ante, p. 191.

(*q*) Stat. 36 & 37 Vict. c. 66, ss. 16—19.

(*r*) Sect. 24, subs. (1).

Defendant's
equitable
relief.

instituted before the passing of the Act. It also provides (*s*), that if any defendant claims to be entitled to any equitable estate or right, or to relief upon any equitable ground, against any deed, instrument or contract, or against any right, title or claim asserted by the plaintiff, or alleges any ground of equitable defence to any claim of the plaintiff, the said Courts respectively, and every judge thereof, shall give to every equitable estate, right or ground of relief so claimed, and to every equitable defence so alleged, the same effect, by way of defence against the claim of the plaintiff, as the Court of Chancery ought to have given, if the same or the like matters had been relied on by way of defence in any suit or proceeding, instituted in that Court for the same or the like purpose before the passing of the Act. Provision is made for counterclaims by the defendant (*t*). Incidental equities are also to be recognized by the Courts respectively and every judge thereof (*u*). And no cause or proceeding at any time pending in the High Court of Justice, or before the Court of Appeal, is to be restrained by prohibition or injunction; but every matter of equity, on which an injunction against the prosecution of any such cause or proceeding might have been obtained, if the Act had not passed, either unconditionally or on any terms or conditions, may be relied on by way of defence thereto. Proceedings, however, may be stayed as therein provided

Counter-
claims.

Incidental
equities.

No cause to
be stayed by
injunction.

Legal rights
to be recog-
nized.

Multiplicity
of suits
avoided.

Subject to these provisions all legal rights are to be recognized as before (*y*). And, as far as possible, all matters in controversy between the parties are to be settled in the same action, and all multiplicity of legal proceedings concerning any of such matters is

(*s*) Stat. 36 & 37 Vict. c. 66,
s. 24, subs. (2).
(*t*) Sect. 24, subs. (3).

(*u*) Sect. 24, subs. (4).
(*x*) Sect. 24, subs. (5).
(*y*) Sect. 24, subs. (6).

to be avoided (z). The Act further provides (a), that **Mandamus.** a mandamus or an injunction may be granted by an interlocutory order of the Court, in all cases in which it shall appear to the Court to be just or convenient that such order should be made; and any such order may be made either unconditionally or upon such terms and conditions as the Court shall think just.

Trusts, then, are not abolished; and, as we have **Trusts not abolished.** seen, the execution of trusts, charitable and private, is assigned to the Chancery Division of the Court (b). The beneficial title is still called the equitable title; the terms *legal* and *equitable estate* are still in use; and the legal estate may still be vested in some other **Legal** person than the beneficial owner. Every purchaser of landed property has, therefore, a right to a good title both at law and in equity; and if the legal estate should be vested in a trustee, or any person other than the vendor, the concurrence of such trustee or other person must be obtained for the purpose of vesting the legal estate in the purchaser, or, if he should please, in a new trustee of his own choosing. When a person has an estate at law, and does not hold it subject to any trust, he has of course the same estate in equity, but without any occasion for resorting to its aid. To him, therefore, the doctrine of trusts does not apply: his legal title is sufficient; the law declares the nature and incidents of his estate, and equity has no ground for interference (c).

We shall now take leave of equity and equitable estates, and proceed, in the next chapter, to explain a modern conveyance.

(z) Stat. 36 & 37 Vict. c. 66,
s. 24, subs. (7).

(a) Sect. 25, subs. (8).

(b) Sect. 34, subs. (3), ante, p.
193.

(c) See *Brydges v. Brydges*, 3
Ves. 127.

CHAPTER IX.

OF A MODERN CONVEYANCE.

Lease and
release.

Release.

IN modern times, down to the year 1841, the kind of conveyance employed, on every ordinary purchase of a freehold estate, was called a lease and release; and for every such transaction, two deeds were always required. From that time to the year 1845, the ordinary method of conveyance was a release merely, or, more accurately, a release made in pursuance of the Act of Parliament (*a*) intituled "An Act for rendering a Release as effectual for the Conveyance of Freehold Estates as a Lease and Release by the same Parties." The object of this Act was merely to save the expense of two deeds to every purchase, by rendering the lease unnecessary.

Act to sim-
plify the
transfer of
property.

A further alteration was then made, by the Act to simplify the transfer of property (*b*), which enacted (*c*), that, after the 31st day of December, 1844, every person might convey by any deed, without livery of seisin, or a prior lease, all such freehold land as he might, before the passing of the Act, have conveyed by lease and release, and every such conveyance should take effect, as if it had been made by lease and release; provided always, that every such deed should be chargeable with the same stamp duty as would have been chargeable if such conveyance had been made by lease and release.

(*a*) Stat. 4 & 5 Vict. c. 21, now
repealed by stat. 37 & 38 Vict.
c. 96.

(*b*) Stat. 7 & 8 Vict. c. 76.
(*c*) Sects. 2, 13.

This Act, however, had not been in operation more than nine months when it was repealed by the Act to amend the law of real property (*d*), which provides, that after the 1st of October, 1845, all corporeal tenements and hereditaments shall, as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant as well as in livery. A simple deed of grant is therefore now sufficient to grant the freehold or feudal seisin of all lands (*e*). But as a lease and release was so long the usual method of conveyance, the nature of a conveyance by lease and release should still form a subject of the student's inquiry; and with this we will accordingly begin.

Act to amend the law of real property.

From the little that has already been said concerning a lease for years (*f*), the reader will have gathered, that the lessee is put into possession of the premises leased for a definite time, although his possession has nothing feudal in his nature, for the law still recognizes the landlord as retaining the seisin or feudal possession. Entry by the tenant was, however, in ancient times, absolutely necessary to make a complete lease (*g*); although, in accordance with feudal principles, it was not necessary that the landlord should depart at once and altogether, as he must have done in the case of a feoffment where the feudal seisin was transferred. When the tenant has thus gained a footing on the premises, under an express contract with his landlord,

A lease for years.

Entry necessary.

The tenant's position altered entry.

(*d*) Stat. 8 & 9 Vict. c. 106, s. 2.

(*e*) By the second section of the Act, the stamp duty on this single deed was the same as was chargeable on the lease and release, except the progressive duty on the lease. But the duty on the lease for a year was repealed by stat. 13 & 14 Vict. c. 97, s. 6, so far as

related to any deed or instrument bearing date after the 10th of October, 1850. This Act with many others is now repealed by stat. 33 & 34 Vict. c. 99; and the stamp duties on deeds are now governed by the Stamp Act, 1870, stat. 33 & 34 Vict. c. 97.

(*f*) Ante, pp. 9, 143.

(*g*) Litt. s. 459; Co. Litt. 270 a.

he became, with respect to the feudal possession, in a different position from a mere stranger; for, he was then capable of acquiring such feudal possession, without any formal livery of seisin, by a transfer or conveyance from his landlord, of all his (the landlord's) estate in the premises. Being already in possession by the act and agreement of his landlord, and under a tenancy recognized by the law, there was not the same necessity for that open delivery of the seisin to him, as there would have been to a mere stranger. In his case, indeed, livery of seisin would have been improper, for he was already in possession under his lease (*h*); and, as a delivery of the possession of the lands could not, therefore, be made to him, it was necessary that the landlord's interest should be conveyed in some other manner. Now the ancient common law always required that a transfer or gift of every kind relating to real property should be made, either by actual or symbolical delivery of the subject of the transfer, or, when this was impossible, by the delivery of a written document (*i*). But in former times, as we have seen (*k*), every writing was under seal; and a writing so sealed and delivered is in fact a deed. In this case, therefore, a deed was required for the conveyance of the landlord's interest (*l*); and such conveyance by deed, under the above circumstances, was termed a *release*. To a lease and release of this kind, it is obvious that the same objection applies as to a feoffment: the inconvenience of actually going on the premises is not obviated; for the tenant must enter before he can receive the release. In the very early periods of our history, this kind of circuitous conveyance was, however, occasionally used. A lease was made for one, two, or three years, completed by the

A release.

Inconvenience
of lease with
entry.

(*h*) Litt. s. 460; Gilb. Uses and Trusts, 104 (223, 3rd ed.).

(*i*) Co. Litt. 9 a; *Doe d. Wors* v. *Cole*, 7 Barn. & Cress. 243, 248;

ante, p. 13.

(*k*) Ante, p. 179.

(*l*) Shep. Touch. 320.

actual entry of the lessee for the express purpose of enabling him to receive a release of the inheritance, which was accordingly made to him a short time afterwards. The lease and release, executed in this manner, transferred the freehold of the releasor as effectually as if it had been conveyed by feoffment (*m*). But a lease and release would never have obtained the prevalence they afterwards acquired had not a method been found out of making a lease, without the necessity of actual entry by the lessee.

The Statute of Uses (*n*) was the means of accomplishing this desirable object. This statute, it may be remembered, enacts, that when any person is seised of lands to the use of another, he that has the use shall be deemed in lawful seisin and possession of the lands, for the same estate as he has in the use. Now, besides a feoffment to one person to the use of another, there were, before this statute, other modes by which a use might be raised or created, or, in other words, by which a man might become seised of lands to the use of some other person. Thus,—if before the Statute of Uses, a bargain was made for the sale of an estate, and the purchase-money paid, but no feoffment was executed to the purchaser,—the Court of Chancery, in analogy to its modern doctrine on the like occasions (*o*), considered that the estate ought in conscience immediately to belong to the person who paid the money, and, therefore, held the bargainor or vendor to be immediately seised of the lands in question *to the use* of the purchaser (*p*). This proper and equitable doctrine of the Court of Chancery had rather a curious effect when the Statute of Uses came into operation; for, as by means

The Statute
of Uses.

Bargain and
sale.

(*m*) 2 Sand. Uses, 61 (74, 5th ed.).

(*n*) 27 Hen. VIII. c. 10.

(*o*) Ante, p. 197.

(*p*) 2 Sand. Uses, 43 (53, 5th ed.); Gilb. Uses and Trusts, 49 (94, 3rd ed.).

of a contract of this kind the purchaser became entitled to the *use* of the lands, so, after the passing of the statute, he became at once entitled, on payment of his purchase-money, to the lawful seisin and possession: or rather, he was deemed really to have, by force of the statute, such seisin and possession, so far at least as it was possible to consider a man in possession, who in fact was not (*q*). It, consequently, came to pass that the seisin was thus transferred from one person to another, by a mere *bargain and sale*, that is, by a contract for sale and payment of money without the necessity of a feoffment, or even of a deed (*r*); and, moreover, an estate in fee simple at law was thus duly conveyed from one person to another without the employment of the technical word *heirs*, which before was necessary to mark out the estate of the purchaser; for it was presumed that the purchase-money was paid for an estate in fee simple (*s*); and as the purchaser had, under his contract, such an estate in the *use*, he of course became entitled, by the very words of the statute, to the same estate in the legal seisin and possession.

The mischievous results of the statute, in this particular, were quickly perceived. The notoriety in the transfer of estates, on which the law had always laid so much stress, was at once at an end; and it was perceived to be very undesirable that so important a matter as the title to landed property should depend on a mere

(*q*) Thus, he could not maintain an action of trespass without being actually in possession, for this action is founded on the disturbance of the actual possession, which is evidently more than the Statute of Uses, or any other statute, can give. Gilb. Uses, 81 (185, 3rd ed.); 2 Fonb. on Equity, 12; *Harrison v. Blackburn*, 17

C. B., N. S. 678. See, however, *Anon.*, Cro. Eliz. 46; Com. Dig. tit. Uses (I); *Heelis v. Blain*, 18 C. B., N. S. 90; *Hadfield's case*, L. R., 8 C. P. 306.

(*r*) Dyer, 229 a; Comyns' Digest, tit. Bargain and Sale (B. 1, 4); Gilb. on Uses and Trusts, 87, 271 (197, 475, 3rd ed.).

(*s*) Gilb. Uses, 62 (116, 3rd ed.).

verbal bargain and money payment, or *bargain and sale*, as it was termed. Shortly after the passing of the Statute of Uses, it was accordingly required by another Act of Parliament (*t*), passed in the same year, that every bargain and sale of any estate of inheritance or freehold should be made by deed indented and enrolled, within six months (which means lunar months) from the date, in one of the Courts of Record at Westminster, or before the *custos rotulorum* and two justices of the peace and the clerk of the peace for the county in which the lands lay, or two of them at least, whereof the clerk of the peace should be one. A stop was thus put to the secret conveyance of estates by mere contract and payment of money. For a deed entered on the records of a Court is of course open to public inspection; and the expense of enrolment was, in some degree, a counterbalance to the inconvenience of going to the lands to give livery of seisin. It was not long, however, before a loophole was discovered in this latter statute, through which, after a few had ventured to pass, all the world soon followed. It was perceived that the Act spoke only of estates of *inheritance or freehold*, and was silent as to bargains and sales for a mere term of years, which is not a freehold. A bargain and sale of lands for a year only was not therefore affected by the Act (*u*), but remained still capable of being accomplished by word of mouth and payment of money. The entry on the part of the tenant, required by the law (*v*), was supplied by the Statute of Uses; which, by its own force, placed him in legal intendment in possession for the same estate as he had in the use, that is, for the term bargained and

Bargains and sales required to be by enrolled.

A loophole discovered in the statute.

Bargain and sale

(*t*) 27 Hen. VIII. c. 16. Deeds of bargain and sale may now be enrolled in the Central Office of the Supreme Court; stats. 36 & 37 Vict. c. 66, ss. 16, 77; 42 & 43 Vict. c. 78; Rules of the Su-

preme Court, 1883, Order LXI., rule 9.

(*u*) Gilb. Uses, 98, 296 (214, 502, 3rd ed.); 2 Sand. Uses, 63 (75, 5th ed.).

(*v*) Ante, p. 217.

Lease and
release

sold to him (*w*). And as any pecuniary payment, however small, was considered sufficient to raise a use (*x*), it followed that if A., a person seised in fee simple, bargained and sold his lands to B. for one year in consideration of ten shillings paid by B. to A., B. became, in law, at once possessed of an estate in the lands for the term of one year, in the same manner as if he had actually entered on the premises under a regular lease. Here, then, was an opportunity of making a conveyance of the whole fee simple, without livery of seisin, entry or enrolment. When the bargain and sale for a year was made, A. had simply to release by deed to B. and his heirs his (A.'s) estate and interest in the premises, and B. became at once seised of the lands for an estate in fee simple. This bargain and sale for a year, followed by a release, is the modern conveyance by *lease and release*—a method which was first practised by Sir Francis Moore, serjeant-at-law, at the request, it is said, of Lord Norris, in order that some of his relations might not know what conveyance or settlement he should make of his estate (*y*); and although the efficiency of this method was at first doubted (*z*), it was, for more than two centuries, the common means of conveying lands in this country. It will be observed that the bargain and sale (or lease as it is called) for a year derived its effect from the Statute of Uses; the release was quite independent of that statute, having existed long before, and being as ancient as the common law itself (*a*). The Statute of Uses was employed in the conveyance by lease and release only for the purpose of giving to the intended releasee, without his actually entering on the lands, such an estate as would enable

(*w*) Gilb. Uses, 104 (223, 3rd ed.).

(*x*) 2 Sand. Uses, 47 (57, 5th ed.).

(*y*) 2 Prest. Conv. 219.

(*z*) Sugd. note to Gilb. Uses, 328; 2 Prest. Conv. 231; 2 Fonb. Eq. 12.

(*a*) Sugd. note to Gilb. Uses, 229.

him to receive the release. When this estate for one year was obtained by the lease, the Statute of Uses had performed its part, and the fee simple was conveyed to the releasee by the release alone. The release would, before the Statute of Uses, have conveyed the fee simple to the releasee, supposing him to have obtained that possession for one year, which, after the statute, was given him by the lease. After the passing of the Statute of Frauds (*b*), it became necessary that every bargain and sale of lands for a year should be put into writing, as no pecuniary rent was ever reserved, the consideration being usually five shillings, the receipt of which was acknowledged, though in fact it was never paid. And the bargain and sale, or lease for a year, was usually made by deed, though this was not absolutely necessary. It was generally dated the day before the date of the release, though executed on the same day as the release, immediately before the execution of the latter (*c*).

Bargain and sale for a year must be in writing.

This cumbrous contrivance of two deeds to every purchase continued in constant use down to the year 1841, when the Act was passed to which we have before referred (*d*), intituled "An Act for rendering a Release as effectual for the Conveyance of Freehold Estates as a Lease and Release by the same Parties." This Act provided that every deed or instrument of release of a freehold estate, or purporting or intended to be so, which should be expressed to be made in pursuance of the Act, should be as effectual, and should take effect as a conveyance to uses or otherwise, and should operate in all respects as if the releasing party or parties, who should have executed the same, had also executed, in due

Act abolishing the lease for a year.

(*b*) Stat. 29 Car. II. c. 3; ante, p. 183.

lease.

(*c*) See Appendix (D.) for the form of deeds of lease and re-

(*d*) Stat. 4 & 5 Vict. c. 21, repealed as obsolete by stat. 37 & 38 Vict. c. 96; ante, p. 216.

Act to amend
the law of
property.

form, a deed or instrument of bargain and sale, or lease for a year, for giving effect to such release, although no such deed or instrument of bargain and sale, or lease for a year, should be executed. As we have seen, since the year 1845 (*e*), a deed of grant has been alone sufficient for the conveyance of all corporeal hereditaments.

The estate
taken must be
marked out.

The legal seisin being thus capable of being transferred by a deed of grant, there is the same necessity now as there was when a feoffment was employed, that the estate which the purchaser is to take should be marked out (*f*). If he has purchased an estate in fee simple, the conveyance must be expressed to be made to him *and his heirs* or to him *in fee simple* (*g*); for the construction of all conveyances, wills only excepted, is in this respect the same; and a conveyance to the purchaser simply, without these words, would merely convey to him an estate for his life, as in the case of a feoffment (*h*). In this case also, as well as in a feoffment, it is the better opinion that, in order to give permanent validity to the conveyance, it is necessary either that a consideration should be expressed in the conveyance, or that it should be made *to the use of* the purchaser as well as *unto* him (*i*): for a lease and release was formerly, and a deed of grant is now, as much an established conveyance as a feoffment; and the rule was, before the Statute of Uses, that any *conveyance*, and not a feoffment particularly, made to another without any consideration, or any declaration of uses, should be deemed to be made *to the use of* the party conveying. In order, therefore, to avoid any such construction, and so to prevent the Statute of

Conveyance
the purchaser.

(*e*) Ante, p. 217.

(*f*) Shep. Touch. 327; see ante, p. 174.

(*g*) See ante, pp. 175, 176.

(*h*) Shep. Touch. 327.

(*i*) 2 Sand. Uses, 64—69 (77—84, 5th ed.); Sugd. note to Gilb. Uses, 233; see ante, pp. 164, 178.

Uses from immediately undoing all that has been done, it is usual to express, in every conveyance, that the purchaser shall hold, not only unto, but unto *and to the use of* himself and his heirs.

A conveyance might also have been made by lease and release, as well as by a feoffment, to one person and his heirs *to the use of* some other person and his heirs; and, in this case, as in a similar feoffment, the latter person took at once the whole fee simple, the former being made, by the Statute of Uses, merely a conduit-pipe for conveying the estate to him (*j*). This extraordinary result of the Statute of Uses is continually relied on in modern conveyancing; and it may now be accomplished by a deed of grant in the same manner as it might have been before effected by a lease and release. It has been found particularly advantageous as a means for avoiding a rule of law, that a man cannot make any conveyance to himself; thus if it were wished to make a conveyance of lands from A., a person solely seised, to A. and B. jointly, this operation could not, before the Statute of Uses, have been effected by less than two conveyances; for a conveyance from A. directly to A. and B. would have passed the whole estate solely to B. (*k*). It would, therefore, have been requisite for A. to make a conveyance to a third person, and for such person then to re-convey to A. and B. jointly. And this was the method actually adopted, under similar circumstances, with respect to leasehold estates and personal property, which are not affected by the Statute of Uses, until an Act was passed by which any person may now assign leasehold or personal property to himself jointly with another (*l*); but this Act does not

A conveyance may be made to uses.

A man cannot

(*j*) See ante, p. 189.

Rep. 595.

(*k*) Perkins, s. 203. So a man cannot covenant to pay money to himself and another on a joint account; *Faulkner v. Lowe*, 2 Ex.

(*l*) Stat. 22 & 23 Vict. c. 35, s. 21; see Williams on Personal Property, 641, 12th ed.

extend to freeholds. If the estate were freehold, previously to the year 1882, A. must have conveyed to B. and his heirs, to the use of A. and B. and their heirs; and a joint estate in fee simple would have immediately vested in them both. In conveyances made after the 31st December, 1881 (*m*), the like result may be obtained without the aid of the Statute of Uses. For by the Conveyancing and Law of Property Act, 1881 (*n*), freehold land may now be conveyed by a person *to himself jointly with another person* by the like means by which it might be conveyed by him to another person. But this enactment does not appear to enable a man to make any conveyance to himself otherwise than *jointly with another person*. Suppose, then, a person should wish to convey a freehold estate to another, reserving to himself a life interest,—without the aid of the Statute of Uses he would be unable to accomplish this result by a single deed (*o*). But, by means of the statute, he may make a conveyance of the property to the other and his heirs, *to the use* of himself (the conveying party) for his life, and from and immediately after his decease, *to the use* of the other and his heirs and assigns, or in fee simple (*p*). By this means the conveying party will at once become seised of an estate only for his life, and after his decease an estate in fee simple will remain for the other.

But a man
may now con-
vey freeholds
to himself
*jointly with
another;*

and may
convey to
another to his
own use.

Form of a
conveyance.

The reader may now turn his attention to the form of a deed of conveyance by grant. Since the commencement of the Conveyancing and Law of Property Act, 1881, that is, after the 31st December, 1881 (*q*), deeds of conveyance may be drawn in shorter form

(*m*) Stat. 44 & 45 Vict. c. 41,
s. 50, subs. 2, s. 1, subs. 2.

(*n*) Stat. 44 & 45 Vict. c. 41,
s. 50; Williams's Conveyancing
Statutes, 223.

(*o*) Perk. ss. 704, 705; *Youle
v. Jones*, 13 Mee. & Wels. 534.

(*p*) See ante, pp. 175, 176.

(*q*) Stat. 44 & 45 Vict. c. 41,
s. 1, subs. 2.

than that previously in use, if the provisions of that Act be relied on. But, before the student can comprehend, much less avail himself of the changes in the practice of conveyancing rendered possible by that Act, it is necessary that he should understand the form of and clauses usual in an ordinary purchase deed of the kind in use previously to the commencement of the Act. He is accordingly presented with a specimen of such a deed, of the simplest order :—

“ THIS INDENTURE (*r*) made the first day of Date.
 “ January 1846 between A. B. of Cheapside in the Partics.
 “ city of London esquire of the one part and C. D. of
 “ Lincoln’s Inn in the county of Middlesex esquire of
 “ the other part WHEREAS by indentures of lease Recital of the
 “ and release (*s*) bearing date respectively the first conveyance to
 “ and second days of January 1838 and respectively
 “ made between E. F. of the one part and the said
 “ A. B. of the other part for the consideration therein
 “ mentioned the messuage lands and hereditaments
 “ hereinafter described with the appurtenances were
 “ conveyed unto and to the use of the said A. B. his
 “ heirs and assigns for ever AND WHEREAS the said Recital of the
 “ A. B. hath contracted with the said C. D. for the contract for
 “ absolute sale to him of the inheritance in fee simple (*t*) sale.
 “ in possession of and in the said messuage lands and
 “ hereditaments with the appurtenances free from all
 “ incumbrances for the sum of one thousand pounds
 “ Now THIS INDENTURE WITNESSETH that in pursu- Testatum.
 “ ance of the said contract and in consideration of the Considera-
 “ sum of one thousand pounds of lawful money of tion.
 “ Great Britain to the said A. B. in hand paid by the
 “ said C. D. upon or before the execution of these
 “ presents (the receipt of which said sum of one thou- Receipt.
 “ sand pounds in full for the absolute purchase of the
 “ inheritance in fee simple in possession of and in

(*r*) Ante, p. 181.(*t*) Ante, pp. 83 et(*s*) Ante, p. 222.

Operative words. "the messuage lands and hereditaments hereinbefore
 "referred to and hereinafter described with the ap-
 "purtenances he the said A. B. doth hereby acknow-
 "ledge and from the same doth release the said C. D.
 "his heirs executors administrators and assigns) He
 "the said A. B. DOTY by these presents GRANT (*u*)
 "unto the said C. D. and his heirs ALL that messuage
 Parcels. "or tenement [*here describe the premises*] Together
 General words. "with all outhouses ways watercourses trees com-
 "monable rights easements and appurtenances to the
 "said messuage lands hereditaments and premises (*v*)
 "hereby granted or any of them belonging or there-
 Estate clause. "with used or enjoyed And all the estate (*x*) and
 Habendum. "right of the said A. B. in and to the same To HAVE
 "AND TO HOLD the said messuage lands hereditaments
 "and premises intended to be hereby granted with the
 "appurtenances unto and to the use of (*y*) the said
 "C. D. his heirs and assigns for ever (*z*)." [*Then*
for he *he* *covenants by the vendor with the purchaser for*
; that is, that he has good right to convey the
freedom from *for their quiet enjoyment by the purchaser, and*
heirs will make *in incumbrances, and that the vendor and his*
reasonably require *all such further conveyances as may be*
ed.] "IN WITNESS whereof the said
 "parties to these presents have hereunto set their hands
 "and seals the day and *year* first above written."
 To the foot of the deed signatures of the parties are appended the seals and
 Two witnesses desirable. endorsed an attestation by (*a*); and, on the back is
 it is very desirable that there the witnesses, of whom
 the deed would not be void should be two, though
 It has been the practice also to even without any (*b*).
 indorse on the back

(*u*) Ante, pp. 217, 224.

(*v*) Ante, p. 18.

(*x*) Ante, p. 21.

(*y*) Ante, p. 224.

(*z*) Ant

(*a*) Ante, pp. 174, 224.

(*b*) 2 Black pp. 183, 184.

Com. 307, 378.

of the deed a further receipt for the purchase-money (*c*); but this is unnecessary with deeds executed after the 31st December, 1881, for a receipt in the body of such deeds is a sufficient discharge (*d*). On the face of the deed will be observed the proper stamps, without which Stamps. it could not formerly have been admitted as evidence (*e*). But the Common Law Procedure Act, 1854 (*f*), provided that, upon payment to the proper officer of the Court of the stamp duty, and certain penalties, any deed or other document should be admissible in evidence, saving all just exceptions on other grounds. And a similar provision is contained in the Stamp Act, 1870 (*g*), by which the stamp duties on deeds have now been consolidated. Purchase-deeds are now subject to *ad valorem* stamps of one-half per cent., or five shillings per fifty pounds on the amount or value of the consideration for the sale, according to the table below (*h*).

(*c*) This practice is of comparatively modern date. See 2 Atkyns, 478; 3 Atk. 112; 2 Sand. Uses, 305, n. A. (118, n., 5th ed.); 3 Preston's Abstracts, 15.

(*d*) By stat. 44 & 45 Vict. c. 41, s. 54; see also s. 55; Williams's Conveyancing Statutes, 227—230

(*e*) 2 Black. Com. 297.

(*f*) Stat. 17 & 18 Vict. c. 125, s. 29, now repealed by stat. 33 & 34 Vict. c. 99.

(*g*) Stat. 33 & 34 Vict. c. 97, s. 16. This Act came into operation on the 1st of January, 1871. The penalties are 10*l.*, and also by way of further penalty, where the unpaid duty exceeds 10*l.*, interest on such duty at the rate of 5*l.* per cent. per annum from the day upon which the instrument was first executed up to the time when such interest is equal in amount to the unpaid duty, also a further sum of 1*l.*

(*h*) Where the amount or value of the consideration for the sale does not exceed £5 £0 0 6

Exceeds	£5 and does not exceed	£10	0	1	0
..	10	15	0	1	6
..	15	20	0	2	0
..	20	25	0	2	6
..	25	50	0	5	0
..	50	75	0	7	6
..	75	100	0	10	0
..	100	125	0	12	6
..	125	150	0	15	0

There was formerly a further progressive duty of 10s. for every *entire* quantity of 1080 words over and above the first 1080, unless the *ad valorem* duty was less than 10s., in which case the progressive duty was equal to the amount of the *ad valorem* duty (*i*). The present scale of *ad valorem* duties was first imposed by the Act to amend the Laws relating to the Inland Revenue (*k*), which was passed on the 5th of July, 1865. Before this Act, the table of stamp duties advanced in a slightly different manner by less minute steps (*l*). These duties again did not apply to any deed or instrument signed or executed by any party thereto, or bearing date, before or upon the 10th of October, 1850. Such a deed, unless preceded by a lease for a year, bears the same stamp duty as the lease for a year was subject to, and also, whether so preceded or not, an *ad valorem* duty according to the table stated below (*m*).

(*h*)—*continued*.

Exceeds £150 and does not exceed £175	£0 17 6
„ 175 „ 200	1 0 0
„ 200 „ 225	1 2 6
„ 225 „ 250	1 5 0
„ 250 „ 275	1 7 6
„ 275 „ 300	1 10 0
„ 300	

For every £50, and also for any fractional part of £50, of such amount or value .. 0 5 0

(*i*) Stat. 13 & 14 Vict. c. 97, schedule, title “Progressive Duties,” now repealed by stat. 33 & 34 Vict. c. 99.

(*k*) Stat. 28 & 29 Vict. c. 96.

(*l*) Stat. 13 & 14 Vict. c. 97, schedule, title “Conveyance.”

(*m*) Where the purchase or consideration money therein expressed shall not amount to £20 £0 10

Amount to £20 and not to £50	1 0
„ 50 „ 150	1 10
„ 150 „ 300	2 0
„ 300 „ 500	3 0
„ 500 „ 750	6 0
„ 750 „ 1000	9 0
„ 1000 „ 2000	12 0
„ 2000 „ 3000	25 0

If the premises should be situate in either of the Registry in counties of Middlesex or York, or in the town and county of Kingston-upon-Hull, a memorandum will ^{be} ~~will~~ Hull. or ought to be found indorsed, to the effect that a memorial of the deed was duly registered on such a day, in such a book and page of the register, established by Act of Parliament, for the county of Middlesex (*n*), or the ridings of York, or the town of Kingston-upon-Hull (*o*). These Acts provided that all deeds should be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable con-

(*m*)—*continued*.

Amount to £3000 and not to £4000				£35	0
„	4000	„	5000	45	0
„	5000	„	6000	55	0
„	6000	„	7000	65	0
„	7000	„	8000	75	0
„	8000	„	9000	85	0
„	9000	„	10,000	95	0
„	10,000	„	12,500	110	0
„	12,500	„	15,000	130	0
„	15,000	„	20,000	170	0
„	20,000	„	30,000	240	0
„	30,000	„	40,000	350	0
„	40,000	„	50,000	450	0
„	50,000	„	60,000	550	0
„	60,000	„	80,000	650	0
„	80,000	„	100,000	800	0
„	100,000		or upwards	1000	0

And for every entire quantity of 1080 words

contained therein over and above the first

1080 words, a further progressive duty of £1 0 .

See stats. 55 Geo. III. c. 184, 4 & 5 Vict. c. 21, 7 & 8 Vict. c. 76, and 8 & 9 Vict. c. 106. The earlier Stamp Acts are stats. 44 Geo. III. c. 98, and 48 Geo. III. c. 149, the latter of which statutes first imposed an *ad valorem* duty on purchase-deeds.

(*n*) Stat. 7 Anne, c. 20.

(*o*) Stats. 2 & 3 Anne, c. 4, 6 Anne, c. 20 (5 Anne, c. 18, in Ruffhead), for the west riding; 6 Anne, c. 62 (6 Anne, c. 35, in Ruffhead), for the east riding and Kingston-upon-Hull; and 8 Geo. II. c. 6, for the north riding; all now repealed and replaced by stat. 47 & 48 Vict. c. 54. The deeds must be first duly stamped. Stat. 33 & 34 Vict. c. 97, s. 22.

Notice of un-
registered
assurance.

sideration, unless a memorial of such deeds were duly registered before the registering of the memorial of the deed under which such subsequent purchaser or mortgagee should claim. Wills of lands in the above counties were also required to be registered, in order to prevail against subsequent purchasers or mortgagees (*p*). The Courts of Equity, however, held that a purchaser or mortgagee of land in a register county, who had had clear previous notice of a prior unregistered assurance affecting the same land, and yet registered his own deed before the other, should not be permitted to gain any priority over the persons claiming under the previous assurance with regard to the *equitable* estate in the land; but should hold the *legal* estate which he acquired by priority of registration, as a trustee for such other persons (*q*). And this doctrine of equity still prevails with respect to land in Middlesex. But with respect to land in Yorkshire and Kingston-upon-Hull, it is now enacted in the Yorkshire Registries Act, 1884 (*r*), which has repealed and replaced the former Registry Acts for those places, that all assurances entitled to be registered under this Act shall have priority according to the date of registration, and every will registered under this Act shall have the priority therein specified; and that all priorities given by this Act shall have full effect in all Courts, except in cases of actual fraud, and all persons claiming thereunder any legal or equitable interests, shall be entitled to corresponding priorities, and no such person shall lose any such priority merely in consequence of his having been affected with actual or constructive notice, except

(*p*) See Williams's Conveyancing Statutes, 21—24; stat. 47 & 48 Vict. c. 54, ss. 4, 11, 12, 14.

(*q*) See Williams's Conveyancing Statutes, 23; *Le Neve v. Le Neve*, 2 White & Tudor, Leading

Cases in Equity, 32, 45—48, 5th ed.; *Rolland v. Hart*, L. R., 6 Ch. 678; ante, p. 193, and note (*y*) thereto.

(*r*) Stat. 47 & 48 Vict. c. 54, s. 14.

in cases of actual fraud. Conveyances of lands forming part of the great level of the fens, called Bedford Level, are also required to be registered in the Bedford Level Office (s); but the construction which has been put on the statute, by which such registry is required, prevents any priority of interest from being gained by priority of registration (t).

Bedford
Level.

From the specimen before him, the reader will be struck with the stiff and formal style which characterizes legal instruments; but the formality to be found in every properly drawn deed has the advantage, that the reader who is acquainted with the usual order knows at once where to find any particular portion of the contents; and in matters of intricacy, which must frequently occur, this facility of reference is of incalculable advantage. The framework of every deed consists but of one, two, or three simple sentences, according to the number of times that the *testatum*, or witnessing part, "Now this Indenture witnesseth," is repeated. This *testatum* is always written in large letters; and, though there is no limit to its repetition (if circumstances should require it), yet, in the majority of cases, it occurs but once or twice at most. In the example above given, it will be seen that the sentence on which the deed is framed is as follows:—"This Indenture, made on such a day between such parties, witnesseth, that for so much money A. B. doth grant certain premises unto and to the use of C. D. and his heirs." After the names of the parties have been given, an interruption occurs for the purpose of introducing the recitals; and when the whole of the introductory circumstances have been mentioned, the thread is resumed, and the deed proceeds, "Now this Indenture witnesseth." The receipt for the purchase-money is again a parenthesis; and soon after comes the de-

Formal style
of legal in-
struments.

Testatum.

(s) Stat. 15 Car. II. c. 17, s. 8.

(t) *Willis v. Brown*, 10 Sim. 127.

description of the property, which further impedes the progress of the sentence, till it is taken up in the *habendum*, "To have and to hold," from which it uninterruptedly proceeds to the end. The contents of deeds, embracing as they do all manner of transactions between man and man, must necessarily be infinitely varied, and a simple conveyance, such as that we have given, is rare, compared with the number of those in which special circumstances occur. But in all deeds, as nearly as possible, the same order is preserved.

Habendum. The names of all the *parties* are invariably placed at the beginning: then follow recitals of facts relevant to the matter in hand; then a preliminary recital, stating shortly what is to be done; then, the *testatum*, containing the *operative words* of the deed, or the words which affect the transaction, of which the deed is the witness or evidence; after this, if the deed relate to property, come the *parcels* or description of the property, either at large, or by reference to some deed already recited; then, the *habendum* showing the estate to be holden; then, the *uses* and *trusts*, if any; and, lastly, such qualifying provisoes and covenants, as may be required by the special circumstances of the case.

Parties. Throughout all this, not a single stop is to be found, and the sentences are so framed as to be independent of their aid; for, no one would wish the title to his estates to depend on the insertion of a comma or semicolon.

Recitals. The commencement of sentences, and now and then some few important words, which serve as landmarks, are rendered conspicuous by capitals: by the aid of these, the practised eye at once collects the sense; whilst, at the same time, the absence of stops renders it next to impossible materially to alter the meaning of a deed without the forgery being discovered.

Operative words.

Parcels.

Habendum.

Uses and trusts.

Covenants.

No stops.

Similarity of

The adherence of lawyers, by common consent, to the same mode of framing their drafts has given rise to

a great similarity in the outward appearance of deeds : and the eye of the reader is continually caught by the same capitals, such as "THIS INDENTURE," "AND WHEREAS," "NOW THIS INDENTURE WITNESSETH," "TO HAVE AND TO HOLD," &c. This similarity of appearance seems to have been mistaken by some for a sameness of contents,—an error for which any one but a lawyer might perhaps be pardoned. And this mistake, coupled with a laudable anxiety to save expence to the public, appears to have produced a plan for making conveyances by way of schedule. In pursuance of this plan two Acts of Parliament were some time since passed, one for conveyances (*u*), which is now repealed, the other for leases (*x*). These Acts, however, as might have been expected, have been very seldom employed ; nor is it possible that any schedule should ever comprehend the multitude of variations to which purchase deeds are continually liable. In the midst of this variety, the adoption, as nearly as possible, of the same framework, is a great saving of trouble, and consequently of expence ; but so long as the power of alienation possessed by the public is exerciseable in such a variety of ways, and for such a multitude of purposes as is now permitted, so long will the conveyance of landed property call for the exercise of learning and skill, and so long also will it involve the expence requisite to give to such learning and skill its proper remuneration. The Solicitors' Remuneration Act, 1881, introduced new methods and principles of remuneration to solicitors for conveyancing and similar business. The manner, however, in which the remuneration afforded to the profession of the law was previously bestowed, calls for some remark. In a country like England, where every employment is subject to the keenest competition, there can be little doubt but that, whatever

Professional
remuneration.

(*u*) Stat. 8 & 9 Vict. c. 119, c. 41, s. 71.
repealed by stat. 44 & 45 Vict. (*x*) Stat. 8 & 9 Vict. c. 124.

method may be taken for the remuneration of professional services, the nature and quantity of the trouble incurred must, on the average and in the long run, be the actual measure of the remuneration paid. The misfortune is, that when a wrong method of remuneration is adopted, the true proportion between service and reward is necessarily obtained by indirect means, and therefore in a more troublesome, and, consequently, more expensive manner, than if a proper scale had been directly used. In the law, unfortunately, this has been the case, and there seems no good reason why any individual connected with the law should be ashamed or afraid of making it known. The labour of a lawyer is very different from that of a copyist or printer; it consists first and chiefly in acquiring a minute acquaintance with the principles of the law, then in obtaining a knowledge of the facts of any particular case which may be brought before him, and lastly, in practically applying to such case the principles he has previously learnt. But, for the last and least of these items alone did he obtain any direct remuneration; for, deeds were paid for by the length, like printing or copying, without any regard to the principles they involved, or to the intricacy or importance of the facts to which they might relate (*y*); and, more than this, the rate of payment was fixed so low, that no man of education could afford for the sake of it, first to ascertain what sort of instrument the circumstances might require, and then to draw a deed containing the full measure of ideas of which words are

(*y*) By stat. 6 & 7 Vict. c. 73, s. 37, the charges of a solicitor for business relating entirely to conveyancing were rendered liable to *taxation* or reduction to the established scale, which was then regulated only by length. Previously to this statute, the bill of a solicitor relating to conveyancing

was not taxable, unless part of the bill was for business transacted in some Court of law or equity. But although conveyancing bills were not strictly taxable, they were always drawn up on the same principle of payment by length, which pervade the other branches of the law.

capable. The payment to a solicitor for drawing a deed was fixed at one shilling for every seventy-two words, denominated a *folio*; and the fees of counsel, though paid in guineas, averaged about the same. The consequence of this false economy on the part of the public has been that certain well known and long established lengthy forms, full of synonyms and expletives, were current among lawyers as *common forms*, and, by the aid of these, ideas were diluted to the proper remunerating strength; not that lawyers actually inserted nonsense simply for the sake of increasing their fees; but words, sometimes unnecessary in any case, sometimes only in the particular case in which they were engaged, were suffered to remain, sanctioned by the authority of time and usage. The proper amount of verbiage to a common form became well established and understood; and whilst any attempt to exceed it was looked on as disgraceful, it was not materially diminished during the time in which the scale of payment remained unchanged. The case of the medical profession has been exactly parallel; for, so long as the public thought that the medicine supplied was the only thing worth paying for, so long were cures accompanied with the customary abundance of little bottles. In both cases, the system has been bad; but the fault has not been with the profession, who bear the blame, but with the public, who fixed the scale of payment, and who, by a little more direct liberality, might have saved themselves a considerable amount of indirect expense. If physicians' prescriptions were paid for by their length, does any one suppose that their present conciseness would long continue?—unless indeed the rate of payment were fixed so high as to leave the average remuneration the same as at present. The Acts relating to conveyances and leases above mentioned contained a provision that, in taxing any bill for preparing and executing any deed under the Acts, the taxing officer should consider, not

The Attor-
neys and
Solicitors
Act, 1870.

Solicitors' Re-
muneration
Act, 1881,
and order
thereunder.

Remuneration
by commission
or percentage.

the length of such deed, but only the skill and labour employed and responsibility incurred in the preparation thereof (*z*). This, so far, was an effort in the right direction. And in the year 1870, an Act was passed to amend the law relating to the remuneration of attorneys and solicitors (*a*), by which such remuneration was authorized, under certain restrictions, to be fixed by agreement (*b*); and which provided (*c*), that upon any taxation of costs, the taxing officer might, in determining the remuneration, if any, to be allowed to the attorney or solicitor for his services, have regard, subject to any general rules or orders thereafter to be made, to the skill, labour and responsibility involved. But the remuneration of solicitors and the taxation of their bills of costs, for conveyancing and other non-contentious business, are now regulated by the general order made under the Solicitors' Remuneration Act, 1881 (*d*); and the Act of 1870 no longer applies to such business (*e*). Under this order, the remuneration of solicitors in respect of business connected with sales, purchases and mortgages completed, and with leases and agreements for leases (other than mining or building leases), and conveyances reserving rent, or agreements for the same, when the transactions shall have been completed, is to be that prescribed in Schedule I. to the order. In respect of all other conveyancing and non-contentious business the remuneration is to be regulated according to the previous system as altered by Schedule II. Schedule I. contains scales of charges adjusted upon the principle of a commission or percentage upon the amount of the purchase or mortgage money, or the rent reserved. Schedule II. prescribes such fees for instructions for deeds, wills, and

(*z*) Stat. 8 & 9 Vict. c. 119,
s. 4; 8 & 9 Vict. c. 124, s. 3.

(*a*) Stat. 33 & 34 Vict. c. 28,
passed 14th July, 1870.

(*b*) Sects. 4—15.

(*c*) Sect. 18.

(*d*) Stat. 44 & 45 Vict. c. 44,
ss. 1—7.

(*e*) Sect. 9.

other documents as may be fair and reasonable, raises the allowance for drawing such documents to 2s. per folio (*f*), and specifies certain other charges. The charges specified in Schedule II. may be increased or diminished in extraordinary cases for special reasons. In all cases to which the scales prescribed in Schedule I. apply, a solicitor may, before undertaking any business, by writing under his hand, communicated to the client, elect that his remuneration shall be according to the previous system as altered by Schedule II.; but if no such election be made, his remuneration will be according to the scale prescribed by Schedule I. Under the same Act of 1881 (*g*), it is competent for a solicitor and his client to enter into an agreement, which must be in writing and duly signed, for the remuneration of the solicitor, to such amount and in such manner as they may think fit, for any business to which the Act relates.

Agreement as
to remunera-

The student should be careful not to confound the verbiage of the old common forms with that formal and orderly style which facilitates the lawyer's perusal of deeds, or with that repetition which is often necessary to exactness without the dangerous aid of stops. The form of a purchase-deed, which has been given above, is disencumbered of such verbiage, whilst at the same time it preserves the regular and orderly arrangements of its parts. A similar conveyance, by lease and release, in the old established common forms, as they existed in their palmiest days, will be found in the Appendix (*h*). Latterly, however, these forms were often much curtailed. Since the introduction in the year 1845 of the conveyance of corporeal hereditaments by grant (*i*), there has been an increasing tendency on the part of conveyancers to eradicate superfluous words from their precedents. And under the influence of the

(*f*) See ante, p. 237.

(*g*) Sect. 8.

(*h*) See Appendix (D).

(*i*) Ante, pp. 217, 224.

changes in practice caused by the operation of the Conveyancing and Law of Property Act, 1881, all unnecessary clauses and expressions are now generally excluded from deeds (*k*).

The Conveyancing and Law of Property Act, 1881.

Changes in the form of conveyances now possible.

General words, estate clause and covenants for title may now be omitted.

Certain words necessary to incorporate statutory covenants for title.

It has been mentioned (*l*) that since the 31st December, 1881, deeds of conveyance may be drawn in shorter form than that previously in use, if the provisions of the Conveyancing and Law of Property Act, 1881 (*m*), be relied on. The nature of those provisions, and the principal changes which may be effected in the form of a conveyance by relying thereon, may be shortly stated as follows:—Those rights and obligations of the parties to a conveyance, which were before determined by the insertion therein of *general words*, of an *estate clause*, and of *covenants for title*, may now be ascertained from certain sections of the Act (*n*). The operation of these sections, however, may be excluded or varied by the terms of the conveyance (*o*). In drawing a deed of conveyance, therefore, in which it is intended to rely on the Act, *the general words, estate clause and covenants for title* are omitted. But, in order to incorporate the proper statutory covenants for title in a conveyance, it is necessary to express therein that the person, who is to be bound by the covenants, conveys in one of the characters mentioned in the Act (*p*). For example, suppose that the simple transaction, to which the purchase-deed given above relates, is to be carried out at the present time, and that it is wished to rely upon the statutory covenants for title, it would then be necessary to express in the deed that A. B., the

(*k*) See Williams's Conveyancing Statutes, 492 et seq.

(*l*) Ante, p. 226.

(*m*) Stat. 44 & 45 Vict. c. 41.

(*n*) Sects. 6, 63 and 7 respectively.

(*o*) Stat. 44 & 45 Vict. c. 41, ss. 6, subs. 4; 7, subss. 4, 7; 63, subs. 2.

(*p*) See stat. 44 & 45 Vict. c. 41, s. 7, subss. 1, 4.

rendor, conveyed as *beneficial owner* (q). It has already Different been mentioned that the estates to be taken by deeds executed after the 31st December, 1881, may be limited or marked out by certain technical words different from those previously necessary (r); and that if a receipt for consideration money be inserted in the body of such a deed, no further receipt need now be endorsed thereon (s). If the student will turn to the last chapter in this book (t), he will find two forms of a deed of conveyance, one such as would have been used in a simple transaction previously to the Act, the other such as may now be used when it is intended to rely upon the Act. These will enable him to see how the changes introduced by the Act are carried out in practice. These changes have been generally adopted by conveyancers: but their employment is optional, and deeds of conveyance may still be drawn in the old form. The student is not yet in a position to understand the advantages or disadvantages of relying on the provisions of the Act. He is ignorant of any reasons for the use of general words (u), and an estate clause, and knows nothing about covenants for title (x). At present, even if he have the curiosity to consult Appendix (D.) and the last chapter for the forms of all those clauses, they will probably be to him unmeaning jargon. However, until they have become something more to him than "words, words, words," he cannot expect to understand the sections of the Conveyancing and Law of Property Act, 1881, by reliance on which the clauses in question may be omitted from a conveyance (y). He is therefore recommended, after looking at the forms of deeds above mentioned, to adjourn the further consideration of

(q) Sect. 7, subs. 1 (A.).

s. 2.

(r) Sect. 51, ante, pp. 175, 176.

(x) See post, Part V., Chapter on Title.

(s) Sect. 54, ante, p. 229.

(t) Post, Part VI.

(y) Stat. 44 & 45 Vict. c. 41,

(u) See post, Part II., Ch. IV.

ss. 6, 7, 63.

this subject, until he shall have arrived at the last chapter in a due course of straightforward reading.

Lease and
release an
innocent con-
veyance.

So a grant.

Word *grant*.

To return :—A lease and release was said to be an innocent conveyance ; for when, by means of the lease and the Statute of Uses, the purchaser had once been put into possession, he obtained the fee simple by the release ; and a release never operates by wrong, as a feoffment occasionally did (*z*), but simply passes that which may lawfully and rightly be conveyed (*a*). The same rule is applicable to a deed of grant (*b*). Thus, if a tenant merely for his own life should, by a lease and release, or by a grant, purport to convey to another an estate in fee simple, his own life interest only would pass, and no injury would be done to the reversioner. The word *grant* is the proper and technical term to be employed in a deed of grant (*c*), but its employment is not absolutely necessary ; for it has been held that other words indicating an intention to grant will answer the purpose (*d*). And by the Conveyancing and Law of Property Act, 1881 (*e*), it is declared that the use of the word grant is not necessary in order to convey tenements or hereditaments, corporeal or incorporeal.

Bargain and
sale.

In addition to a conveyance by deed of grant, other methods are occasionally employed. Thus, there may be a *bargain and sale* of an estate in fee simple, by deed duly inrolled pursuant to the Statute 27 Hen. VIII. c. 16, already mentioned (*f*). The chief advantage of a bargain and sale is, that by a Statute of Anne (*g*) an

(*z*) Ante, p. 177.

(*a*) Litt. s. 600.

(*b*) Litt. ss. 616, 617.

(*c*) Shep. Touch. 229.

(*d*) *Shove v. Pincke*, 5 T. Rep. 124 ; *Haggerston v. Hanbury*, 5 Barn. & Cress. 101.

(*e*) Stat. 44 & 45 Vict. c. 41, s. 49, which applies to conveyances made before or after the commencement of the Act. See Williams's Conveyancing Statutes, 222.

(*f*) Ante, p. 221.

Stat. 10 Anne, c. 18, s. 3.

office copy of the inrolment of a bargain and sale is made as good evidence as the original deed. In some cities and boroughs the inrolment of bargains and sales is made by the mayors or other officers (*h*). And in the county palatine of Lancaster it may be made in the palatine Court of Chancery (*i*); and so the inrolment of bargains and sales of land in the counties of Chester and Durham might have been made in the palatine Courts of those counties until their abolition (*k*). The Yorkshire Registry Acts provided that bargains and sales of lands in the county of York might be inrolled in the register of the riding in which the lands lie (*l*). But these Acts are now repealed and replaced by the Yorkshire Registries Act, 1884 (*m*), which does not contain any provision making the inrolment of a bargain and sale in the county registers effectual under Stat. 27 Hen. VIII. c. 16. When a bargain and sale is employed, the whole legal estate in fee simple passes, as we have seen (*n*), by means of the Statute of Uses,—the bargainor becoming seised to the use of the bargainee and his heirs. A bargain and sale, therefore, cannot, like a lease and release, or a grant, be made to one person to the use of another; for, the whole force of the Statute of Uses is already exhausted in transferring the legal estate in fee simple to the bargainee; so that the use declared would be a use upon a use, void at law, though valid in equity (*o*). Similar to a bargain and sale is another method of conveyance occasionally, though very rarely, employed, namely, a *covenant to stand seised* to the use of another, in con-

Inrolment.

Bargain and sale cannot be person to the use of another.

Covenant to stand seised.

(*h*) Stat. 27 Hen. VIII. c. 16, s. 2.

(*i*) Stat. 5 Eliz. c. 26.

(*k*) By stat. 11 Geo. IV. & 1 Will. IV. c. 70, as to Chester; and by stat. 36 & 37 Vict. c. 66, s. 16, as to Durham: see ante,

pp. 114, 115.

(*l*) Stat. 5 & 6 Anne, c. 18, s. 1; 6 Anne, c. 35, ss. 16, 17, 34; 8 Geo. II. c. 6, s. 21.

(*m*) Stat. 47 & 48 Vict. c. 54.

(*n*) Ante, pp. 219, 220.

(*o*) Ante, pp. 191, 220.

sideration of blood or marriage (*p*). In addition to Appointment. these methods, there may be a conveyance by *appointment* of a use, under a *power of appointment*, of which more will be said in a future chapter (*q*). The student, indeed, can never be too careful to avoid supposing that, when he has read and understood a chapter of the present, or any other elementary work, he is therefore acquainted with all that is to be known on the subject. To place him in a position to comprehend more is all that can be attempted in a first book.

(*p*) See *Doe d. Daniell v. Wood-* Jur. 632.

roffe, 10 Mee. & Wels. 608; *Doe*
d. *Starling v. Prince*, C. P., 15

(*q*) See the chapter on Executory Interests.

CHAPTER X.

OF A WILL OF LANDS.

THE right of testamentary alienation of lands is a matter depending upon Act of Parliament. We have seen, that previously to the reign of Henry VIII. an estate in fee simple, if not disposed of in the lifetime of the owner, descended, on his death, to his heir at law (*a*). To this rule, gavelkind lands, and lands in a few favoured boroughs, formed exceptions; and the hardship of the rule was latterly somewhat mitigated by the prevalence of conveyances to *uses*; for the Court of Chancery allowed the *use* to be devised by will (*b*). But when the Statute of Uses (*c*) came into operation, and all uses were turned into legal estates, the title of the heir again prevailed, and the inconvenience of the want of testamentary power then begun to be felt. To remedy this inconvenience, an Act of Parliament (*d*), to which we have before referred (*e*), was passed six years after the enactment of the Statute of Uses. By this Act, every person having any lands or hereditaments holden in socage, or in the nature of socage tenure, was enabled by his last will and testament in writing, to give and devise the same at his will and pleasure; and those who had estates in fee simple in lands held by knights' service were enabled in the same way, to give and devise two-third parts thereof. When, by the statute of 12 Car. II. c. 24 (*f*), socage was made the

Statute of
Wills.

(*a*) Ante, p. 86.

(*b*) Ante, p. 187.

(*c*) Stat. 27 Hen. VIII. c. 10;
ante, p. 188.

(*d*) 32 Hen. VIII. c. 1, explained by statute 34 & 35 Hen. VIII. c. 5.

(*e*) Ante, p. 86.

(*f*) Ante, p. 153.

The Statute
of Frauds.

Wills Act.

universal tenure, all estate in fee simple became at once devisable, being all then holden by socage. This extensive power of devising lands by a mere writing unattested was soon curtailed by the Statute of Frauds (*g*), which required that all devises and bequests of any lands or tenements, devisable either by statute or the custom of Kent, or any borough, or any other custom, should be in writing, and signed by the party so devising the same, or by some other person in his presence and by his express directions, and should be attested and subscribed in the presence of the said devisor by three or four credible witnesses, or else they should be utterly void and of none effect. And thus the law continued till the year 1837, when an Act was passed for the amendment of the laws with respect to wills (*h*). By this Act the original statute of Henry VIII. (*i*) was repealed, except as to wills made prior to the 1st of January, 1838, and the law was altered to its present state. This Act permits of the devise by will of every kind of estate and interest in real property which would otherwise devolve to the heir of the testator, or, if he became entitled by descent, to the heir of his ancestor (*j*); but enacts (*k*), that no will shall be valid, unless it shall be in writing, and signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator, in the presence of *two* or more witnesses, present at the same time (*l*); and such witnesses shall attest, and shall subscribe the will in the presence of the testator. One would have thought that this enactment was sufficiently clear, especially that part of it which directs the will to

29 Car. II. c. 3, s. 5.

(*h*) Stat. 7 Will. IV. & 1 Vict.

c. 26.

(*i*) 32 Hen. VIII. c. 1.

(*j*) Stat. 7 Will. IV. & 1 Vict.

c. 26, s. 3.

(*k*) Sect. 9.

(*l*) See *In the goods of Gunston, Blake v. Blake*, 7 P. D. 102; *Wright v. Sanderson*, 9 P. D. 149.

be signed at the foot or end thereof. Some very careless testators, and very clever judges, have, however, contrived to throw upon this clause of the Act a discredit which it does not deserve. And it has accordingly been enacted (*m*), by way of explanation, that every will shall, so far only as regards the position of the signature of the testator, or of the person signing for him, be deemed to be valid, if the signature shall be so placed at, or after, or following, or under, or beside, or opposite to the end of the will, that it shall be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will; and that no such will shall be affected by the circumstance that the signature shall not follow, or be immediately after, the foot or end of the will, or by the circumstance that a blank space shall intervene between the concluding word of the will and the signature, or by the circumstance that the signature shall be placed among the words of the testimonium clause, or of the clause of attestation, or shall follow or be after or under the clause of attestation, either with or without a blank space intervening, or shall follow or be after or under or beside the names, or one of the names, of the subscribing witnesses, or by the circumstance that a signature shall be on a side or page, or other portion of the paper or papers, containing the will, whereon no clause or paragraph or disposing part of the will shall be written above the signature, or by the circumstance that there shall appear to be sufficient space on or at the bottom of the preceding side or page, or other portion of the same paper, on which the will is written, to contain the signature; and the enumeration of the above circumstances is not to restrict the generality of the above enactment. But no signature is to be operative to give effect to any disposition or direction which is

Wills Act
1837, s. 11.

(*m*) Stat. 15 & 16 Vict. c. 24.

underneath, or which follows it; nor shall it give effect to any disposition or direction inserted after the signature shall be made. The unlearned reader will perhaps be of opinion that there is not one of the positions above so laboriously enumerated, that might not very properly have been considered as at the foot or end of the will within the spirit and meaning of the Act; except in the case of a large blank being left before the signature, apparently for the purpose of the subsequent insertion of other matter: in which case the fraud to which the will lays itself open would be a sufficient reason for holding it void.

Who may be witnesses.

The Statute of Frauds, it will be observed, required that the witnesses should be credible; and, on the point of credibility, the rules of law with respect to witnesses have, till recently, been very strict; for the law had so great a dread of the evil influence of the love of money, that it would not even listen to any witness who had the smallest pecuniary interest in the result of his own testimony. Hence, under the Statute of Frauds, a bequest to a witness to a will, or to the wife or husband of a witness, prevented such witness from being heard in support of the will; and, the witness being thus incredible, the will was void for want of three credible witnesses. By an Act of Geo. II. (*n*), a witness to whom a gift was made was rendered credible, and the gift only which was made to the witness was declared void; but the Act did not extend to the case of a gift to the husband or wife of a witness; such a gift, therefore, still rendered the whole will void (*o*). Under the Wills Act, however, the incompetency of the witness at the time of the execution of the will, or at any time afterwards, is not

Wills Act.

(*n*) Stat. 25 Geo. II. c. 6.

71, 72, 4th edit.; 2 Strange,

(*o*) *Hatfield v. Thorpe*, 5 Barn.

1255.

& Ald. 589; 1 Jarm. on Wills,

sufficient to make the will invalid (*p*); and if any person shall attest the execution of a will, to whom, or to whose wife or husband, any beneficial interest whatsoever shall be given (except a mere charge for payment of debts), the person attesting will be a good witness; but the gift of such beneficial interest to such person, or to the wife or husband of such person, will be void (*q*). Creditors, also, are good witnesses, although the will should contain a charge for payment of debts (*r*); and the mere circumstance of being appointed executor is no objection to a witness (*s*). By more recent statutes (*t*), the rule which excluded the evidence of witnesses in Courts of justice, and of parties to actions and suits, on account of interest, has been very properly abolished; and the evidence of interested persons is now received, and its value estimated according to its worth; but the Wills Act is not affected by these statutes (*u*). The Courts of common law had formerly exclusive jurisdiction in questions arising on the validity of a will of real estate, whilst the Ecclesiastical Courts had the like exclusive jurisdiction over wills of personal estate. But in the year 1857 an Act was passed establishing a Court of Probate (*v*), whose jurisdiction was in 1875 transferred to the High Court of Justice, and has since been principally exercised in the Probate, Divorce, and Admiralty Division, in which all wills of personal estate are now required to be proved. This Act provided for the citation before the Court of the heir at law of the testator and the devisees of his

Court of
Probate.

(*p*) Stat. 7 Will. IV. & 1 Vict. c. 26, s. 14.

(*q*) Stat. 7 Will. IV. & 1 Vict. c. 26, s. 15. See *Gurney v. Gurney*, 3 Drew. 208; *Tempest v. Tempest*, 2 Kay & J. 635; *Thorpe v. Bestwick*, 6 Q. B. D. 311.

(*r*) Sect. 16.

(*s*) Sect. 17.

(*t*) Stat. 6 & 7 Vict. c. 85; 14 & 15 Vict. c. 99, amended by stat. 16 & 17 Vict. c. 83.

(*u*) Stat. 6 & 7 Vict. c. 85, s. 1; 14 & 15 Vict. c. 99, s. 5.

(*v*) Stat. 20 & 21 Vict. c. 77, amended by stat. 21 & 22 Vict. c. 95.

real estate ; and such heir and devisees, when cited, will be bound by the proceedings (*x*) ; but this occurs only when a contest is expected or actually takes place. In all ordinary cases, a will, so far as it affects real estate, does not require to be proved.

Revocation of
a will.

By marriage.

By burning,
&c.

So much, then, for the power to make a will of lands, and for the formalities with which it must be accompanied. A will, it is well known, does not take effect until the decease of the testator. In the meantime, it may be revoked in various ways ; as, by the marriage of either a man or a woman (*y*) ; though, before the Wills Act, the marriage of a man was not sufficient to revoke his will, unless he also had a child born (*z*). A will may also be revoked by burning, tearing, or otherwise destroying the same, by the testator, or by some person in his presence, and by his direction, with the intention of revoking the same (*a*). But the Wills Act enacts (*b*), that no obliteration, interlineation, or other alteration, made in any will after its execution shall have any effect (except so far as the words or effect of the will, before such alteration, shall not be apparent), unless such alteration shall be executed in the same manner as a will ; but

(*x*) Stat. 20 & 21 Vict. c. 77, ss. 61, 62, 63. See per Jessel, M. R., in *Sugden v. Lord St. Leonards*, 1 P. D. 236. These provisions extend only to wills made since the Wills Act. *Campbell v. Lucy*, L. R., 2 Prob. 209.

(*y*) Stat. 7 Will. IV. & 1 Vict. c. 26, s. 18. "Except a will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not, in default of such appointment, pass to his or her heir, customary heir, executor or

administrator, or the person entitled, as his or her next of kin, under the Statute of Distributions." *In the goods of Fenwick*, Law Rep., 1 Court of Probate, 319.

(*z*) 1 Jarman on Wills, 122, 4th ed. See *Marston v. Roe* d. Fox, 8 Ad. & Ell. 14.

(*a*) Stat. 7 Will. IV. & 1 Vict. c. 26, s. 20 ; *Andrew v. Motley*, 12 C. B., N. S. 514 ; see *Cheese v. Lovejoy*, 2 P. D. 251.

(*b*) Sect. 21.

the signature of the testator, and the subscription of the witnesses, may be made in the margin, or on some other part of the will, opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will. A will may also be revoked by any writing, executed in the same manner as a will, and declaring an intention to revoke, or by a subsequent will or codicil (*c*), to be executed as before. And where a codicil is added, it is considered as part of the will; and the disposition made by the will is not disturbed further than is absolutely necessary to give effect to the codicil (*d*).

By writing
duly exe-
cuted.

By subsequent
will.

By codicil.

The above are the only means by which a will can now be revoked; unless, of course, the testator choose afterwards to part with any of the property comprised in his will, which he is at perfect liberty to do. In this case the will is revoked, as to the property parted with, if it does not find its way back to the testator, so as to be his at the time of his death. Under the Statute of Hen. VIII. a will of lands was regarded in the light of a *present conveyance*, to come into operation at a future time, namely, on the death of the testator. And if a man, having made a will of his lands, afterwards disposed of them, they would not, on returning to his possession, again become subject to his will, without a subsequent republication or revival of the will (*e*). But, under the Wills Act, no subsequent conveyance shall prevent the operation of the will, with respect to such devisable estate or interest as the testator shall have at the time of his death (*f*). In the

Subsequent
disposition.

(*c*) Stat. 7 Will. IV. & 1 Vict.
c. 26, s. 20. See *Hellier v. Hel-*
lier, 9 P. D. 237.

(*d*) 1 Jarman on Wills, 176,
4th ed.

(*e*) 1 Jarman on Wills, 147, 198,
4th ed.

(*f*) Stat. 7 Will. IV. & 1 Vict.
c. 26, s. 23.

After-purchased lands.

same manner, the old statute was not considered as enabling a person to dispose by will of any lands, except such as he was possessed of at the time of making his will: so that lands purchased after the date of the will could not be affected by any of its dispositions, but descended to the heir at law (*g*). This also is altered by the Wills Act, which enacts (*h*), that every will shall be construed, with reference to the property comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will.

A will now speaks from the death of the testator.

So that every man may now dispose, by his will, of all such landed property, or real estate, as he may hereafter possess, as well as that which he now has. Again, the result of the old rule, that a will of lands was a present conveyance, was, that a general devise by a testator of the residue of his lands was, in effect, a specific disposition of such lands and such only as the testator then had, and had not left to any one else (*i*).

General residuary devisee.

A general residuary devisee was a devisee of the lands not otherwise left, exactly as if such lands had been given him by their names. The consequence of this was, that if any other persons to whom lands were left died in the lifetime of the testator, the residuary devisee had no claim to such lands, the gift of which thus failed; but the lands descended to the heir at law. This rule is altered by the Act, under which (*k*), unless a contrary intention appear by the will, all real estate comprised in any devise, which shall fail by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law, or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in the will.

1 Jarman on Wills, 645, 27 Ch. D. 600.
4th ed.

(*h*) Stat. 7 Will. IV. & 1 Vict.

c. 26, s. 24; *Re Portal and Lamb*,

(*i*) 1 Jarman on Wills, 645,

4th ed.

(*k*) Sect. 25.

This failure of a devise, by the decease of the devisee in the testator's lifetime, is called a *lapse*; and this lapse is not prevented by the lands being given to the devisee *and his heirs*; and in the same way, before the Wills Act, a gift to the devisee and the *heirs of his body* would not carry the lands to the heir of the body of the devisee, in case of the devisee's decease in the lifetime of the testator (*l*). For, the terms *heirs* and *heirs of the body* are words of limitation merely; that is, they merely mark out the estate, which the devisee, if living at the testator's death, would have taken,—in the one case an estate in fee simple, in the other an estate tail; and the heirs are no objects of the testator's bounty; further than as connected with their ancestor (*m*). Two cases have, however, been introduced by the Wills Act, in which the devise is to remain unaffected by the decease of the devisee in the testator's lifetime. The first case is that of a devise of real estate to any person for an *estate tail*; in which case, if the devisee should die in the lifetime of the testator, leaving issue who would be inheritable under such entail, and any such issue shall be living at the death of the testator, such devise shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will (*n*). The other case is that of the devisee being *a child or other issue* of the testator dying in the testator's lifetime and leaving issue any of whom are living at the testator's death. In this case, unless a mere life estate shall have been left to the devisee, the devise shall not lapse, but shall take effect as in the former case (*o*).

A lapse.

No lapse now in two cases.

Estate tail.

Devise to issue of testator.

(*l*) *Hodgson and Wife v. Ambrose*, 1 Dougl. 337.

(*m*) Plowd. 345; 1 Rep. 105; 1 Jarm. Wills, 338, 4th ed.

(*n*) Stat. 7 Will. IV. & 1 Vict.

c. 26, s. 32.

(*o*) Sect. 33. See Principles of the Law of Personal Property, 409, 11th ed.; 548, 12th ed.; *Johnson v. Johnson*, 3 Hare, 157;

Construction
of wills.

Intention to
be observed.

The construction of wills is the next object of our attention. In construing wills, the Courts have always borne in mind, that a testator may not have had the same opportunity of legal advice in drawing his will, as he would have had in executing a deed. And the first great maxim of construction accordingly is, that the intention of the testator ought to be observed (*p*). The decisions of the Courts, in pursuing this maxim, have given rise to a number of subsidiary rules, to be applied in making out the testator's intention; and, when doubts occur, these rules are always made use of to determine the meaning; so that the true legal construction of a will is occasionally different from that which would occur to the mind of an unprofessional reader. Certainty cannot be obtained without uniformity, nor uniformity without rule. Rules, therefore, have been found to be absolutely necessary; and the indefinite maxim of observing the intention is now largely qualified by the numerous decisions which have been made respecting all manner of doubtful points, each of which decisions forms or confirms a rule of construction, to be attended to whenever any similar difficulty occurs. It is, indeed, very questionable, whether this maxim of observing the intention, reasonable as it may appear, has been of any service to testators; and it has certainly occasioned a great deal of trouble to the Courts. Testators have imagined that the making of wills, to be so leniently interpreted, is a matter to which anybody is competent; and the consequence has been an immense amount of litigation, on all sorts of contradictory and nonsensical bequests. An intention, moreover, expressed clearly enough for ordinary apprehensions, has often been defeated by some technical

Technical
rules.

Eccles v. Cheyne, 2 Kay & J. 676; (*p*) 30 Ass. 183 a; Year Book,
Griffiths v. Gale, 12 Sim. 354; 9 Hen. VI. 24 b; Litt. 586;
Eager v. Furnivall, 17 Ch. D. 115. Perkins, s. 555; 2 Black. Com.
381.

rule, too stubborn to yield to the general maxim, that the intention ought to be observed. Thus, in one case (*q*), a testator declared his intention to be, that his son should not sell or dispose of his estate, for longer time than his life, and to that intent he devised the same to his son for his life, and after his decease, to the heirs of the body of his said son. The Court of King's Bench held, as the reader would no doubt expect, that the son took only an estate for his life; but this decision was reversed by the Court of Exchequer Chamber, and it is now well settled that the decision of the Court of King's Bench was erroneous (*r*). The testator unwarily made use of technical terms, which always require a technical construction. In giving the estate to the son for life, and after his decease to the heirs of his body, the testator had, in effect, given the estate to the son *and the heirs of his body*. Now such a gift is an estate tail; and one of the inseparable incidents of an estate tail is, that it may be barred in the manner already described (*s*). The son was, therefore, properly entitled, not to an estate for life only, but to an estate tail, which would at once enable him to dispose of the lands for an estate in fee simple. In contrast to this case are those to which we have before adverted, in the chapter on estates for life (*t*). In those cases, an intention to confer an estate in fee simple was defeated by a construction, which gave only an estate for life; a gift of lands or houses to a person simply, without words to limit or mark out the estate to be taken, was held to confer a mere life interest. But, in such cases, the Courts, conscious of the pure technicality of the rule, were continually striving to avert the hardship of its effect, by laying hold of the most minute variations

Example of
an intended
life estate,
held to be an
estate tail.

An intended
fee simple,
held to be
only an estate
for life.

(*q*) *Perrin v. Blake*, 4 Burr. 2579; 1 Sir Wm. Bla. 672; 1 Dougl. 343.

(*r*) *Fearne*, Cont. Rem. 147 to 172.

(*s*) *Ante*, p. 68.

(*t*) *Ante*, p. 25.

Wills Act.

of phrase, as matter of exception. Doubt thus took the place of direct hardship; till the legislature thought it time to interpose. A remedy is now provided by the Act for the amendment of the laws with respect to wills (*u*), which enacts (*x*), that where any real estate shall be devised to any person, without any words of limitation, such devise shall be construed to pass the fee simple, or other the whole estate or interest, which the testator had power to dispose of by will, in such real estate, unless a contrary intention shall appear by the will. In these cases, therefore, the rule of law has been made to give way to the testator's intention; but the case above cited, in which an estate tail was given when a life estate only was intended, is sufficient to show, that rules still remain which give to certain phrases such a force and effect, as can be properly directed by those only who are well acquainted with their power.

Gift in case
of death
without issue.

Another instance of the defeat of intention arose in the case of a gift of lands to one person, "and in case he shall die without issue," then to another. The Courts interpreted the words, "in case he shall die without issue," to mean "in case of his death, and of the failure of his issue;" so that the estate was to go over to the other, not only in case of the death of the former, leaving no issue *living at his decease*, but also in the event of his leaving issue, and his issue afterwards failing, by the decease of all his descendants. The Courts considered that a man might properly be said to be "dead without issue," if he had died and left issue, all of whom were since deceased; quite as much as if he had died, and left no issue behind him. In accordance with this view, they held such a gift as above mentioned to be, by implication, a gift to the first person and his issue, with a remainder over, on such issue failing, to the second. This

(*u*) 7 Will. IV. & 1 Vict. c. 26.

(*x*) Sect. 28.

was, in fact, a gift of an estate tail to the first party (y); ^{Such a gift} for an estate tail is just such an estate as is descendible to the issue of the party, and will cease when he has no longer heirs of his body, that is, when his issue fails. Had there been no power of barring entails, this would no doubt have been a most effectual way of fulfilling to the utmost the testator's intention. But, as we have seen, every estate tail in possession is liable to be barred, and turned into a fee simple, at the will of the owner. With this legal incident of such an estate, the Courts considered that they had nothing to do; and by this construction, they accordingly enabled the first devisee to bar the estate tail which they adjudged him to possess, and also the remainder over to the other party. He ^{defeated.} thus was enabled at once to acquire the whole fee simple, contrary to the intention of the testator, who most probably had never heard of estates tail, or of the means of barring them. This rule of construction had been so long and firmly established, that nothing but the power of Parliament could effect an alteration. This was done ^{Wills Act.} by the Act for the amendment of the laws with respect to wills, which directs (z) that in a will the words "die without issue," and similar expressions, shall be construed to mean a want or failure of issue in the lifetime, or at the death of the party, and not an indefinite failure of issue; unless a contrary intention shall appear by the will, by reason of such person having a prior estate tail, or of a preceding gift being, without any implication arising from such words, a gift of an estate tail to such person or issue, or otherwise.

From what has been said, it will appear that, before the above-mentioned alteration, an estate tail might have been given by will, by the mere implication, arising from ^{Implication.} the apparent intention of the testator, that the land

(y) 1 Jarm. Wills, 554, 4th ed.; *Machell v. Weeding*, 8 Sim. 4, 7.

(z) Sect. 29.

Gift of an
estate tail by
will.

Gift of a fee
simple by will.

should not go over to any one else, so long as the first devisee had any issue of his body. In the particular class of cases to which we have referred, this implication is now excluded by express enactment. But the general principle by which any kind of estates may be given by will, whenever an intention so to do is expressed, or clearly implied, still remains the same. In a deed, technical words are always required; to create an estate tail by a deed, it is necessary, as we have seen (a), that the word *heirs*, coupled with *words of procreation*, such as *heirs of the body*, or the words *in tail* (b), should be made use of. So, we have seen that, to give an estate in fee simple, it is necessary, in a deed, to use the word *heirs*, or the words *in fee simple* (b), as words of limitation, to limit or mark out the estate. But in a will, a devise to a person and his seed (c), or to him and his issue (d), and many other expressions, are sufficient to confer an estate tail; and a devise to a man and his *heirs male*, which, in a deed, would be held to confer a fee simple (e), in a will gives an estate in tail male (f); for the addition of the word "male," as a qualification of heirs, shows that a class of heirs, less extensive than *heirs general*, was intended (g); and the gift of an estate in tail male, to which, in a will, words of procreation are unnecessary, is the only gift, which at all accords with such an intention. So, even before the enactment, directing that a devise without words of limitation should be construed to pass a fee simple, an estate in fee simple was often held to be conferred, without the use of the word *heirs*. Thus, such an estate was given by a devise to one in *fee simple*, or to him *for ever* or to him *and his assigns for*

(a) Ante, pp. 175, 176.

(b) Stat. 44 & 45 Vict. c. 41, s. 51.

(c) Co. Litt. 9 b; 2 Black. Com. 115.

(d) *Martin v. Swannell*, 2 Beav.

249; 2 Jarm. Wills, 412, 4th ed.

(e) Ante, pp. 175, 176.

(f) Co. Litt. 27 a; 2 Black. Com. 115.

g) 2 Jarm. Wills, 324, 4th ed.

(*h*), or by a devise of all the testator's *estate*, or of all his *property*, or all his *inheritance*, and by a vast number of other expressions, by which an intention to give the fee simple could be considered as expressed or implied (*i*).

The doctrine of uses and trusts applies as well to a will as to a conveyance made between living parties. Thus, a devise of lands to A. and his heirs to the use of B. and his heirs, upon certain trusts to be performed by B., will vest the legal estate in fee simple in B.; and the Court will compel him to execute the trust; unless, indeed, he disclaim the estate, which he is at perfect liberty to do (*k*). But, if any trust or duty should be imposed upon A., it will then become a question, on the construction of the will, whether or not A. takes any *legal* estate; and, if any, to what extent. If no trust or duty is imposed on him, he is a mere conduit-pipe for conveying the legal estate to B., filling the same passive office as a person to whom a feoffment or conveyance has been made to the use of another (*l*). From a want of acquaintance on the part of testators with the Statute of Uses (*m*), great difficulties have frequently arisen in determining the nature and extent of the estates of trustees under wills. In doubtful cases, the leaning of the Courts was to give to the trustees no greater estate than was absolutely necessary for the purposes of their trust. But this doctrine having frequently been found inconvenient, provision has been made in the Wills Act (*n*), that, under certain

Uses and trusts.

Co. Litt. 9 b; 2 Black. Com. 108.

(*i*) 2 Jarm. Wills, 274 et seq., 4th ed.

(*k*) *Nicloson v. Wordsworth*, 2 Swanst. 365; *Urch v. Walker*, 3 Mylne & Craig, 702; *Siggers v. Evans*, 5 El. & Bl. 367, 380.

(*l*) 2 Jarm. Wills, 290, 291, 4th ed.; *Baker v. White*, L. R., 20 Eq. 166; see ante, p. 189.

(*m*) 27 Hen. VIII. c. 10; ante, p. 188.

(*n*) Stat. 7 Will. IV. & 1 Vict. c. 26, ss. 30, 31.

circumstances, not always to be easily explained, the fee simple shall pass to the trustees, instead of an estate determinable when the purposes of the trust shall be satisfied.

Danger of
ignorance of
legal rules.

The above examples may serve as specimens of the great danger a person incurs, who ventures to commit the destination of his property to a document framed in ignorance of the rules, by which the effect of such document must be determined. The Wills Act, by the alterations above mentioned, has effected some improvement; but no Act of Parliament can give skill to the unpractised, or cause every body to attach the same meaning to doubtful words. The only way, therefore, to avoid doubts on the construction of wills, is to word them in proper technical language,—a task to which those only who have studied such language can be expected to be competent.

Devise to
heir.

If the testator should devise land to the person who is his heir at law, it is provided by the “Act for the Amendment of the Law of Inheritance” (*o*) that such heir shall be considered to have acquired the land as a devisee, and not by descent. Such heir, thus taking by *purchase* (*p*), will, therefore, become the stock of descent; and in case of his decease intestate, the lands will descend to *his* heir, and not to the heir of the testator, as they would have done had the lands *descended* on the heir. Before this Act, an heir to whom lands were left by his ancestor’s will was considered to take by his prior title of descent as heir, and not under the will,—unless the testator altered the estate and limited it in a manner different from that in which it would have descended to the heir (*q*).

(*o*) Stat. 3 & 4 Will. IV. c. 106,
s. 3; see *Strickland v. Strickland*,
10 Sim. 374.

(*p*) Ante, p. 125.
(*q*) Watk. Descents, 174, 176
(229, 231, 4th ed.).

It is usually the practice, as is well known, for every testator to appoint an executor or executors of his will; and the executors so appointed have important powers of disposition over the personal estate of the testator (*r*). But the devise of the real estate of the testator is quite independent of the executors' assent or interference, unless the testator should either expressly or by implication have given his executors any estate in or power over the same. In modern times, however, the doctrine has been broached, that if a testator charges his real estate with the payment of his debts, such a charge gives by implication a power to his executors to sell his real estate for the payment of his debts. The author has elsewhere attempted to show that this doctrine, though recognized in several modern cases, is inconsistent with legal principles (*s*); and in this he has since been supported by the great authority of Lord St. Leonards (*t*). In consequence, however, of the difficulties to which these cases gave rise, an Act has passed by which, where there is a charge of debts or legacies, the trustees in some cases and in other cases the executors of a testator are empowered to sell his real estate for the purpose of paying such debts or legacies. The Act to further amend the law of property and to relieve trustees (*u*), which was passed on the 13th August, 1859, enacts (*r*), that where, by any will that shall come into operation after the passing of the Act, the testator shall have charged his real estate or any specific portion thereof with the payment of his debts or of any legacy, and shall have devised the estate so charged to any trustee or trustees for the whole of his estate or interest therein, and shall not have made any express provision

Devise of real
esti-
pe-
executors'
assent.

Charge of
debts.

Where
tee
or
to pay
tor's debts or
legacies.

(*r*) Principles of the Law of Personal Property, 394, 11th ed.; 528, 12th ed.

(*s*) See the Author's Essay on Real Assets, c. 6.

(*t*) Sugd. Pow. 120—122, 8th ed.

(*u*) Stat. 22 & 23 Vict. c. 35,

(*x*) Sect. 14.

for the raising of such debts or legacy out of the estate, such trustee or trustees may, notwithstanding any trusts actually declared by the testator, raise such debts or legacy by sale or mortgage of the lands devised to them. And the powers thus conferred extend to all persons in whom the estate devised shall for the time being be vested by survivorship, descent or devise, and to any persons appointed to succeed to the trusteeship, either under any power in the will, or by the Court (y).

Where execu-

to pay debts
or legacies.

But if any testator, who shall have created such a charge, have devised the hereditaments charged in

such terms as that his whole estate and interest therein shall become vested in any trustee or trustees, the executor or executors for the time being named in his will (if any) shall have the same power of raising the same moneys as is before vested in the trustees; and such power shall from time to time devolve to the person or persons (if any) in whom the executorship shall for the time being be vested (z). And purchasers or mortgagees are not to be bound to inquire whether the powers thus conferred shall have been duly exercised by the persons acting in exercise thereof (a). But these provisions are not to prejudice or affect any sale or mortgage made or to be made in pursuance of any will coming into operation before the passing of the Act;

Devise in fee
or in tail
charged with
debts.

nor are they to extend to a devise to any person in fee or in tail, or for the testator's whole estate and interest, charged with debts or legacies; nor are they to affect the power of any such devisee to sell or mortgage as he or they may by law now do. In these cases the law is that the devisee may, in the exercise of his inherent right of alienation, either sell or mortgage the lands devised to him; but if legacies only are charged thereon, the purchaser or mortgagee is bound to see his money

Charges of
legacies only.

(y) Stat. 22 & 23 Vict. c. 35,
s. 15.

(z) Sect. 16.
(a) Sect. 17.

duly applied in their payment (*b*). If, however, the testator's debts are charged on the lands, then, whether there be legacies also charged or not, the practical impossibility of obliging the purchaser or mortgagee to look to the payment of so uncertain a charge exonerates him from all liability to do more than simply pay his money to the devisee on his sole receipt (*c*). As we have seen (*d*), when an order is made under the Bankruptcy Act, 1883 (*e*), for the administration in bankruptcy of a deceased debtor's estate (*f*), his property (*g*) vests in the official receiver of the Court (*h*) as trustee thereof, who is then empowered to realize the same by sale or otherwise, and distribute the proceeds among the creditors of the deceased (*i*).

Charge of debts.

Order for administration in bankruptcy of deceased debtor's estate.

In cases of death occurring after the 31st December, 1881, the executors of a will may, in certain instances, take an interest in, or a power over, real estate vested in their testator. For, by the Conveyancing and Law of Property Act, 1881 (*k*), real estate vested in any person solely upon any trust, or by way of mortgage, on his death devolves to and becomes vested in his personal representatives or representative from time to time, in like manner as if the same were a chattel real vesting in them or him. And by the same Act (*l*), where, at the death of any person, there is subsisting a contract enforceable against his heir or devisee, for the sale of the fee simple or other freehold interest descendible

Executors now take an interest in real estate—

vested in a sole trustee or mortgagee;

and a power to convey real estate contracted to be sold.

(*b*) *Horn v. Horn*, 2 Sim. & Stu. 448; *Essay on Real Assets*, p. 63.

(*c*) *Essay on Real Assets*, pp. 62, 63; *Corser v. Cartwright*, L.R., 7 H. of L., E. & I. 731.

(*d*) *Ante*, p. 142.

(*e*) Stat. 46 & 47 Vict. c. 52, s. 125; *Williams on Personal Property*, 282—285, 12th ed.

(*f*) See *ante*, p. 107.

(*g*) See *Williams on Property*, 232—234, 12th ed.

(*h*) See *ibid.*, p. 217.

(*i*) See *ibid.*, pp. 239, 246, 283.

(*k*) Stat. 44 & 45 Vict. c. 41, s. 30; see *Williams's Conveyancing Statutes*, 170—176; *Re Pilling's Trusts*, 26 Ch. D. 432.

(*l*) Sect. 4; see *Williams's Conveyancing Statutes*, 54—58.

to his heirs general in any land, his personal representatives shall, by virtue of the Act, have power to convey the land for all the estate and interest vested in him at his death, in any manner proper for giving effect to the contract; but a conveyance made under this enactment is not to affect the beneficial rights of any person claiming under any testamentary disposition, or as heir, or next of kin, of a testator or an intestate.

Wills in Middlesex and Yorkshire to be registered.

The Registry Acts for Middlesex (*m*) and Yorkshire and the town and county of Kingston-upon-Hull (*n*), provided that a memorial of all wills of lands in those counties should be registered within six months after the death of every testator dying within the kingdom of Great Britain, or within three years after the death of every testator dying upon the seas or in parts beyond the seas; otherwise every such devise by will should be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration (*o*). But in consequence of the construction placed upon these Acts by the Courts of Equity (*p*), if a purchaser or mortgagee from the heir of one, who held land in a register county, had had clear previous notice of a will devising the same land, he could not, by registering his deed, gain any priority over the devisees in respect of the equitable estate in the land (*q*). The Vendor and Purchaser Act, 1874 (*r*), provides (*s*), that where the will of a testator devising lands in Middlesex or Yorkshire has not been registered within the period allowed by law in that behalf, an assurance of such land to a purchaser or mortgagee by the devisee, or by some one

New enactment, relief to purchasers and mortgagees.

(*m*) Stat. 7 Anne, c. 20, s. 8.

(*n*) Stats. 2 & 3 Anne, c. 4, s. 20; 6 Anne, c. 62 (6 Anne, c. 35, in Ruffhead); 8 Geo. II. c. 6, s. 15. See Williams's Conveyancing Statutes, 21—23.

(*o*) *Chadwick v. Turner*, 34 Beav. 634; affirmed L. R., 1 Ch. 310;

Dart's Vendors and Purchasers, 682, 5th ed.

(*p*) See ante, p. 232.

(*q*) Williams's Conveyancing Statutes, 21, and n. (*q*).

(*r*) Stat. 37 & 38 Vict. c. 78.

(*s*) Sect. 8. See Williams's Conveyancing Statutes, 21—24.

deriving title under him, shall, if registered before, take precedence of and prevail over, any assurance from the testator's heir at law. As we have seen (*t*), the old Yorkshire Registry Acts were repealed by the Yorkshire Registries Act, 1884 (*u*), in which it is enacted (*x*) that every will registered under this Act shall have priority according to the date of the death of the testator, if the date of registration thereof be within, or under this Act to be deemed to be within (*y*) a period of six months after the death of the testator, or according to the date of registration thereof, if such date of registration be not within, or under this Act to be deemed to be within, such period of six months. This Act also provides for the registration of an affidavit of intestacy at any time after the expiration of six months from the death of a person holding land within Yorkshire and Kingston-upon-Hull; and enacts that, where any such affidavit of intestacy has been duly registered, any assurance for valuable consideration made or executed by any person who would be empowered to make or execute the same in case of such intestacy, and duly registered, shall have priority over any will of the supposed intestate, the date of registration of which shall be subsequent to the date of registration of such assurance or will and not within or under this Act to be deemed to be within a period of six months after the death of the supposed intestate (*z*). As we have seen (*a*), this Act provides that no person claiming any legal or equitable interest under any priority given by the Act shall lose any such priority merely in consequence of his having been affected with actual or constructive notice, except in cases of actual fraud.

Registration
in Yorkshire

(*t*) Ante, p. 232.

(*u*) Stat. 47 & 48 Vict. c. 54, s. 51.

(*x*) Sect. 14.

(*y*) See sect. 11, which provides for registration of notice of

a will within six months after the testator's death, if the will itself cannot be registered within the same period.

(*z*) Sect. 12.

(*a*) Ante, p. 232.

CHAPTER XI.

OF THE MUTUAL RIGHTS OF HUSBAND AND WIFE.

THE next subject of our attention will be the mutual rights in respect of lands, arising from the relation of husband and wife. In pursuing this subject, let us consider, first, the rights of the husband in respect of the lands of his wife; and, secondly, the rights of the wife in respect of the lands of her husband.

The rights of the husband in respect of the lands of his wife.

1. First, then, as to the rights of the husband in respect of the lands of his wife. Since the commencement of the year 1883, the legal capacity of wives, with regard to property, has been completely changed by the operation of the Married Women's Property Act, 1882 (*a*). But married women, whose marriage took place before the 1st of January, 1883, still remain partially subject to the previous law (*b*); without some knowledge of which, it is impossible to understand the Act in question. We shall therefore first explain the position in which wives were formerly placed with regard to property by the different rules of law and equity. At common law, by the act of marriage, the husband and wife became in law one person, and so continued during the coverture or marriage (*c*). The wife was as it were merged in her husband. Accordingly, the husband was entitled to the whole of the rents and profits which might

(*a*) Stat. 45 & 46 Vict. c. 75.
See Williams's Conveyancing Statutes, 373, 382, 383.

(*b*) See sect. 5; Williams's Conveyancing Statutes, 421, 422;

Re Harris's Settled Estates, 28 Ch. D. 171.

(*c*) Litt. s. 168; 1 Black. Com. 442; Gilb. Ten. 108; 1 Roper's Husband and Wife, 1.

arise from his wife's lands, and acquired a freehold estate therein, during the continuance of the coverture (*d*); and, in like manner, all the goods and personal chattels of the wife, the property in which passed by mere delivery of possession, belonged solely to her husband (*e*). For by the ancient common law, it was impossible that the wife should have any power of disposition over property for her separate benefit, independently of her husband. And if the wife had an equitable estate in land for life or of inheritance, the husband was entitled to receive the rents and profits, and acquired an equitable estate therein during the continuance of the coverture. It appears, however, that in such a case the wife might, under certain circumstances, acquire a right in equity to have a provision for her maintenance secured to her by the settlement of the rents and profits, or part thereof, in trust for that purpose (*f*). In modern times, however, if property of any kind were vested in trustees, in trust to apply the income *for the separate use* of a woman during any coverture, present or future, the trust for the separate use of the wife might be enforced in equity. That is, the Courts of Equity obliged the trustees to hold for the sole benefit of the wife, and prevented the husband from interfering with her in the disposal of such income;

Wife's equitable estate.

Wife's equity to a settlement.

Trusts for separate use enforced.

(*d*) 1 Rep. Husb. and Wife, 3; *Robertson v. Norris*, 11 Q. B. 916.

(*e*) 1 Rep. Husb. and Wife, 169; see *Williams on Personal Property*, 570—573, 12th ed.

(*f*) If the husband became bankrupt, and the wife had no means of support, she might obtain such a settlement as against his assignee or trustee in bankruptcy. But she could not obtain such a settlement as against her husband, so long as he supported her; or against his assignee for valuable consideration,

though her husband should, subsequently to the assignment, have ceased to support her. See *Sturgis v. Champneys*, 5 My. & Cr. 97; *Tidd v. Lister*, 10 Hare 140; 3 De G., M. & G. 857, 869 870; *Durham v. Crackles*, 8 Jur. N. S. 1175; *Gleaves v. Paine* 1 De G., J. & S. 87, 93, 94 *Wortham v. Pemberton*, 1 De G. & Sm. 644, 661; *Smith v. Matthews*, 3 De G., F. & J. 139; *Barnes v. Robinson*, 1 N. R. 257; Sugd. V. & P. 560, 14th ed.; *Williams on Settlements*, 99, 100.

Separate property may be rendered inalienable.

she consequently enjoyed the same absolute power of disposition over the equitable estate or interest therein as if she were sole or unmarried (*g*). And, if the income of property were given directly to a woman, for her separate use, without the intervention of any trustee, the Court compelled her husband himself to hold his marital rights in such income simply as a trustee for his wife independently of himself (*h*). The limitation of property in trust for the separate use of an intended wife was one of the principal objects of a modern marriage settlement. By means of such a trust, a provision might be secured, which would be independent of the debts and liabilities of the husband, and thus free from the risk of loss, either by reason of his commercial embarrassments, or of his extravagant expenditure. In order more completely to protect the wife, the Court of Chancery allowed property thus settled for the separate use of a woman to be so tied down for her own personal benefit, that she should have no power, during her coverture, to anticipate or assign her income; for it is evident that, to place the wife's property beyond the power of her husband, is not a complete protection for her,—it must also be placed beyond the reach of his persuasion. In this particular instance, therefore, an exception has been allowed to the general rule, which forbids any restraint to be imposed on alienation. For, when the trust, under which property was held for the separate use of a woman during any coverture, declared that she should not dispose of the same or of the income thereof in any mode of anticipation, every attempted disposition by her during such coverture was deemed absolutely void (*i*). In the year 1875, the

(*g*) See ante, note (*y*) to p. 193; Williams on Personal Property, 583—585, 12th ed.

(*h*) 2 Rop. Husb. and Wife, 152, 182; *Major v. Lansley*, 2

Russ. & Mylne, 355.

(*i*) *Brandon v. Robinson*, 18 Ves. 434; 2 Rop. Husb. and Wife, 230; *Tullett v. Armstrong*, 1 Beav. 1; 4 Mylne & Cr. 390; *Scarborough*

jurisdiction of the Court of Chancery with respect to the enforcement of trusts was, as we have seen, transferred to the High Court of Justice; and is now principally exercised in the Chancery Division (*k*). Under this jurisdiction, trusts for the separate use of married women may still be created and enforced, and a restraint imposed upon the alienation by a wife of her separate property (*l*). But the interest of a married woman in any property may, with her consent, be bound by judgment or order of the Court made after the 31st December, 1881, when it appears to the Court to be for her benefit, notwithstanding that she be restrained from anticipation (*m*).

Not only the income, but also the corpus of any property, whether real or personal, might be limited to the separate use of a married woman. Decisions of the year 1865 finally established that a simple gift of real estate, either with or without the intervention of trustees (*n*), for the separate use of a married woman, was sufficient to give her in equity a power to dispose of it by deed or will, without the consent or concurrence of her husband (*o*). The same rule had long been established with respect to personal estate (*p*). But where the legal estate in lands was vested in the wife, it had still to be conveyed by a deed to be separately

As to the
corpus.

Real estate.

v. Borman, 1 Beav. 34; 4 M. & Cr. 377; *Baggett v. Meux*, 1 Collyer, 138; affirmed, 1 Ph. 627; ante, p. 120.

(*k*) See ante, pp. 191, 193, 213, 215, and note (*y*) to p. 193.

(*l*) See stat. 45 & 46 Vict. c. 75, s. 19; Williams on Personal Property, 596, 12th ed.

(*m*) Stat. 44 & 45 Vict. c. 41, s. 39. See Williams's Conveyancing Statutes, 198—200.

(*n*) *Hall v. Waterhouse*, V.-C. S., 5 Giff. 64; 13 W. R. 633.

(*o*) *Taylor v. Meads*, L. C., 13 W. R. 394; 11 Jur., N. S. 166; 4 De Gex, Jones & Smith, 597.

As to the effect of a restraint on anticipation attached to a gift of real estate of inheritance for the separate use of a married woman, see *Baggett v. Meux*, 1 Ph. 627.

(*p*) See Principles of the Law of Personal Property, 447, 11th ed.; 584, 12th ed.

acknowledged by her, in the manner to be presently explained.

The Married Women's Property Act, 1870.

The Married Women's Property Act, 1870 (*q*), provided that where any freehold, copyhold or customary-hold property should descend upon any woman, married after the passing of that Act, as heiress or co-heiress of an intestate, the rents and profits of such property should, subject and without prejudice to the trusts of any settlement affecting the same, belong to such woman for her separate use, and her receipts alone should be a good discharge for the same (*r*). This Act, however, was repealed as from the commencement of the year 1883, without prejudice to any right acquired while it was in force (*s*). And the rights of wives in respect of real estate are now regulated by the following enactments of the Married Women's Property Act, 1882 (*t*), which came into operation on the 1st of January, 1883 (*u*).

Married woman to be capable of holding property as a *feme sole*.

(Sect. 1, sub-s. 1.) A married woman shall, in accordance with the provisions of this Act, be capable of acquiring, holding, and disposing by will or otherwise, of any real or personal property as her separate property, in the same manner as if she were a *feme sole*, without the intervention of any trustee.

Property of a woman married after the Act to be held by her as a *feme sole*.

(Sect. 2.) Every woman who marries after the commencement of this Act shall be entitled to have and to hold as her separate property and to dispose of in manner aforesaid all real and personal property which shall belong to her at the time of marriage, or shall be acquired by or devolve upon her after marriage, including

(*q*) Stat. 33 & 34 Vict. c. 93, passed 9th August, 1870.

Statutes, 382.

(*r*) Stat. 33 & 34 Vict. c. 93, s. 8. As to the effect of this enactment, see *Re Voss*, 13 Ch. D. 504; Williams's Conveyancing

(*s*) Stat. 45 & 46 Vict. c. 75, ss. 22, 25.

(*t*) Stat. 45 & 46 Vict. c. 75.

(*u*) Sect. 25.

any wages, earnings, money and property gained or acquired by her in any employment, trade or occupation, in which she is engaged, or which she carries on separately from her husband, or by the exercise of any literary, artistic, or scientific skill.

(Sect. 5.) Every woman married before the commencement of this Act shall be entitled to have and to hold and to dispose of in manner aforesaid as her separate property all real and personal property, her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue after the commencement of this Act, including any wages, earnings, money, and property so gained or acquired by her as aforesaid (*x*).

Property as woman married before the Act to be held by her as a feme sole.

(Sect. 19.) Nothing in this Act contained shall interfere with or affect any settlement or agreement for a settlement made or to be made, whether before or after marriage, respecting the property of any married woman, or shall interfere with or render inoperative any restriction against anticipation (*y*) at present attached or to be hereafter attached to the enjoyment of any property or income by a woman under any settlement, agreement for a settlement, will, or other instrument; but no restriction against anticipation contained in any settlement or agreement for a settlement of a woman's own property to be made or entered into by herself shall have any validity against debts contracted by her before marriage, and no settlement or agreement for a settlement shall have any greater force or validity against creditors of such woman than a like settlement or agreement for a settlement made or entered into by a man would have against his creditors (*z*).

Saving of existing the power to make future settlements.

The effect of this Act is discussed in the notes thereto

(*x*) See *Baynton v. Collins*, Chitty, J., 27 Ch. D. 604.

(*y*) See ante, pp. 268, 269.

(*z*) See Williams on Personal Property, 471—473, 12th ed., and see ante, p. 102.

contained in the Editor's "Conveyancing Statutes" (*a*). It is thought that, if any real estate, which becomes the separate property of a wife by virtue of this Act, should have been limited to her directly, the legal estate will vest in her alone, and her husband will not acquire any estate therein or right to receive the rents and profits during the continuance of the coverture. And if any real estate should, since the commencement of the Act, be limited to trustees upon trust for a wife, it is thought that her equitable estate therein will be her separate property by virtue of the Act, although no trust for her separate use should have been imposed (*b*).

Husband and wife considered as one person.

Gift to husband and wife and a third person.

Gift to husband and wife and their heirs.

Whilst provisions for the separate benefit of a married woman could only be enforced in equity (*c*), the rule of law by which husband and wife were considered as one person still continued in operation, and was occasionally productive of rather curious consequences. Thus, if lands were given to A. and B. (husband and wife), and C., a third person, and their heirs—here, had A. and B. been distinct persons, each of the three joint tenants would, as we have seen (*d*), have been entitled, as between themselves, to one-third part of the rents and profits, and would have had a power of disposition also over one-third part of the whole inheritance. But, since A. and B., being husband and wife, were only one person, they took, under such a gift, a moiety only of the rents and profits, with a power to dispose only of one-half of the inheritance (*e*); and C., the third person, took the other half, as joint tenant with them. Again, if lands were given to A. and B. (husband and wife) and their heirs—here, had they

(*a*) Pages 373 et seq.

(*b*) See Williams's Conveyancing Statutes, 382, 383, 418, 419, 421.

(*c*) See ante, p. 267.

(*d*) Ante, pp. 162, 166.

(*e*) Litt. s. 291; *Gordon v. Whieldon*, 11 Beav. 170; *Re Wylde*, 2 De Gex, M. & G. 724.

been separate persons, they would have become, under the gift, joint tenants in fee simple, and each would have been enabled, without the consent of the other, to dispose of an undivided moiety of the inheritance. But as A. and B. were one, they took, as it was said, *by entireties*; and, whilst the husband might do what he pleased with the rents and profits during the coverture, he could not dispose of any part of the inheritance, without his wife's concurrence. Unless they both agreed in making a disposition, each one of them had to run the risk of gaining the whole by survivorship, or losing it by dying first (*f*). Another consequence of the unity of husband and wife was the inability of either of them to convey to the other. As a man could not convey to himself, so he could not convey to his wife, who was regarded as part of himself (*g*). But by means of the Statute of Uses the effect of a conveyance by a man to his wife could be produced (*h*); for a man might and still may convey to another person to the use of his wife in the same manner as, under the statute, a man may convey to the use of himself (*i*). And by the Conveyancing and Law of Property Act, 1881, in conveyances made after the 31st December, 1881, freehold land may be conveyed by a husband to his wife, and by a wife to her husband, alone or jointly with another person (*k*). A man has always been able to leave lands to his wife by his will; for the married state does not deprive the husband of that disposing power which he would possess if single (*l*), and a devise by will does not take effect until after his decease (*m*). If real estate be limited to a husband and wife, so that

They took by entireties.

Husband and wife could not convey to each other.

Wife's separate property.

(*f*) *Doc d. Freestone v. Parratt*, 5 T. Rep. 652.

(*g*) Litt. s. 168; see Williams's Conveyancing Statutes, 391, 392.

(*h*) 1 Rep. Husb. and Wife, 53.

(*i*) Ante, p. 226.

(*k*) Stat. 44 & 45 Vict. c. 41, s. 50; see Williams's Conveyancing Statutes, 223, 224, 391, 392.

(*l*) See Williams on Personal Property, 571, 12th ed.

(*m*) Litt. s. 168.

her interest therein becomes her separate property under the Married Women's Property Act, 1882 (*n*), they will take, not by entireties, but as joint tenants (*o*). But that Act has not directly repealed the rule, that husband and wife are one person in law; and at present it remains an open question what construction the Court will place upon a gift to husband and wife and a third person, as joint tenants or tenants in common, when the gift is made after the year 1882 (*p*). It is thought, however, that a husband may now convey any real estate to his wife directly, to be held by her as her separate property under that Act; and that a wife may now convey to her husband any real estate which she holds as her separate property by virtue of that Act (*q*).

Curtesy.

By the common law, if the wife survived her husband, her estates in fee simple remained to herself and her heirs, after his death, unaffected by any debts which he might have incurred, or by any alienation which he might have attempted to make; for, although the wife, by marriage, was prevented from disposing of her fee simple estates, either by deed or will, yet neither could the husband, without his wife's concurrence, make any disposition of her lands to extend beyond the limits of his own interest. If, however, he should have survived his wife, he would, in case he had had issue by her born alive, that might by possibility inherit the estate as her heir, have become entitled to an estate for the residue of his life in such lands and tenements of his wife as she was solely seised of in fee simple, or fee tail in possession (*r*). The husband, while in the enjoyment

(*n*) Ante, pp. 270, 271.

(*o*) *Re March, Mander v. Harris*, 27 Ch. D. 166.

(*p*) See *S. C.*, 27 Ch. D. 169, 171.

(*q*) See Williams's Conveyancing Statutes, 391, 392.

(*r*) Litt. ss. 35, 52; 2 Black. Com. 126; 1 Rop. Husb. and Wife, 5; *Barker v. Barker*, 2 Sim. 249.

of this estate, was called a tenant by the *curtesy* of England, or, more shortly, tenant by the curtesy. If the wife's estate should have been equitable only, that is, if the lands should have been vested in trustees for her and her heirs, her husband would still, on surviving, in case he had had issue which might inherit, be entitled to be tenant by the curtesy, in the same manner as if the estate were legal(s); for equity in this respect followed the law. But, whether legal or equitable, the estate must have been a several one, or else held under a tenancy in common, and must not have been one of which the wife was seised or possessed jointly with any other person or persons (t). The estate must also have been an estate in possession; for there could be no curtesy of an estate in reversion expectant on a life interest or other estate of freehold (u). The husband must also have had, by his wife, issue born alive; except in the case of gavelkind lands, where the husband had a right to his curtesy, whether he had had issue or not; but, by the custom of gavelkind, curtesy extends only to a moiety of the wife's lands, and ceases if the husband marries again (x). The issue must also have been capable of inheriting as heir to the wife (y). Thus, if the wife were seised of lands in tail male, the birth of a daughter only would not entitle her husband to be tenant by curtesy; for the daughter could not by possibility inherit such an estate from her mother. And it was

Estate must
not be

possession-

have been
except as to
gavelkind
lands.

Issue must
have
capable
inheriting as
heir to the

(s) 1 Rop. Husb. and Wife, 18. There have been conflicting decisions as to the husband's right to curtesy, when the lands were settled on trust for the wife's separate use. See *Moore v. Webster*, V.-C. S., L. R., 3 Eq. 267; *Appleton v. Rowley*, V.-C. M., L. R., 8 Eq. 139; *Cooper v. MacDonald*, 7 Ch. D. 288; *Eager v. Furnicall*, 17 Ch. D. 115; see also the author's Lectures on

Settlements, pp. 105—108. The later decisions were in favour of the husband's right to an estate by the curtesy in such lands.

(t) Co. Litt. 183 a; 1 Roper's Husb. and Wife, 12.

(u) 2 Black. Com. 127; Watk. Desc. 111 (121, 4th ed.).

(x) Co. Litt. 30 a, n. (1); Bac. Abr. title Gavelkind (A.); Rob. Gavel. book ii. c. 1.

(y) Litt. s. 52; 8 Rep. 34 b.

The wife
have
been actually

Wife's sepa-
rate property.

necessary that the wife should have acquired an actual seisin of all estates, of which it was possible that an actual seisin could be obtained; for the husband had it in his own power to obtain for his wife an actual seisin; and it was his own fault if he had not done so (*z*). Since the commencement of the Married Women's Property Act, 1882 (*a*), a tenancy by the curtesy at common law can only occur in respect of the lands of a wife married before the year 1883, which lands have not been her separate property under that Act. The important question remains, whether a husband can have a right to be tenant by the curtesy of real estate of inheritance, which has been his wife's separate property by virtue of that Act. The Act itself is silent upon the subject, and the point has not yet come before the Courts. It is not unlikely that they will hold, by analogy to the previous law, that the husband may have an estate by the curtesy in such lands (*b*). It is thought that, if a wife die intestate, real estate, which has been her separate property under that Act, will descend to the heir of the last purchaser, according to the previous law (*c*), subject or not to her husband's right to curtesy, as the Courts may decide (*d*). The question of the husband's curtesy can only arise if the wife die intestate; for he can have no estate by the curtesy if she should have devised her separate real property by will (*e*). A tenancy by the curtesy is not

(*z*) 2 Black. Com. 131; *Parker v. Carter*, 4 Hare, 416. In the first edition of this work a doubt was thrown out whether, under the new law of inheritance, a husband can ever become tenant by the curtesy to any estate which his wife has inherited. The reasons which afterwards induced the author to incline to the contrary opinion will be found

in Appendix (E). See *Eager v. Furnivall*, 17 Ch. D. 115.

(*a*) See ante, pp. 270—272.

(*b*) See Williams's *Conveyancing Statutes*, 459, 460.

(*c*) See ante, pp. 270, 274.

(*d*) See Williams's *Conveyancing Statutes*, 452, 459.

(*e*) A husband had no right to curtesy out of lands settled on trust for his wife's separate use,

now of very frequent occurrence; the rights of husbands in the lands of their wives are, at the present day, generally ascertained by proper settlements made previously to marriage.

By a statute of the reign of Henry VIII. (*f*) power was given for all persons of full age, having an estate of inheritance in fee simple or in fee tail, in right of their wives, or jointly with their wives, to make leases, with the concurrence of their wives (*g*), of such of the lands as had been most commonly let to farm for twenty years before, for any term not exceeding twenty-one years or three lives, under the same restrictions as tenants in tail were by the same Act empowered to lease. This statute, so far as it respects tenants in tail, has already been referred to (*h*). It was repealed by the Settled Estates Act of the year 1856 (*i*). Now, under provisions of the Settled Estates Act, 1877 (which replace similar enactments of the Act of 1856), every person entitled to the possession or the receipt of the rents and profits of any unsettled estate, as tenant by the curtesy, or in right of a wife who is seised in fee, has the same power of leasing as is thereby given to a tenant for life (*k*). And by the Settled Land Act, 1882 (*l*), a tenant by the curtesy has the powers of leasing and sale, and the other powers given to a tenant for life by that Act (*m*). By a statute of Anne (*n*), every husband seised in right of his wife only, who, after the determination of his estate or interest, without the express consent of the persons next immediately entitled after the determination of such

Power for
the wife's
lands.

not
is a
passer

if she had devised her equitable estate therein by will. *Cooper v. Macdonald*, 7 Ch. D. 288.

(*f*) Stat. 32 Hen. VIII. c. 28.

(*g*) Sect. 3.

(*h*) Ante, p. 78.

(*i*) Stat. 19 & 20 Vict. c. 120, s. 35.

(*k*) Stat. 40 & 41 Vict. c. 18, s. 46. See ante, p. 34.

(*l*) Stat. 45 & 46 Vict. c. 38, s. 58, sub-s. 1 (viii); see also stat. 47 & 48 Vict. c. 18, s. 8.

(*m*) See ante, pp. 35—38, 43—46, 49—54.

(*n*) Stat. 6 Anne, c. 18, s. 5.

estate or interest shall hold over and continue in possession of any hereditaments, shall be adjudged to be a trespasser; and the full value of the profits received during such wrongful possession may be recovered in damages against him or his executors or administrators.

Hitherto we have seen the extent of the husband's interest, and power of disposition, apart from his wife, at common law and in equity (*o*); and the wife's power of disposing of the equitable estate in land settled on trust for her separate use (*p*), and of her separate property under the Married Women's Property Act, 1882 (*q*). If land were settled in trust for the separate use of the wife, with a clause restraining alienation, we have seen that neither husband nor wife could make any disposition. But, in all other cases, before the Act of 1882, the husband and wife *together* might make any such dispositions of the wife's interest in real estate as she could do if unmarried. The mode in which such dispositions were formerly effected was, by a *fine* duly levied in the Court of Common Pleas. We have already had occasion to advert to fines, in respect to their former operation on estates tail (*r*). They were, as we have seen, fictitious suits commenced and then compromised by leave of the Court, whereby the lands in question were acknowledged to be the right of one of the parties. Whenever a married woman was party to a fine, it was necessary that she should be examined apart from her husband, to ascertain whether she joined in the fine of her own free-will, or was compelled to it by the threats and menaces of her husband (*s*). Having this protection, a fine by husband and wife was an effectual conveyance, as well of the wife's as of the husband's interest of every kind,

Fine.

(*o*) Ante, pp. 266, 267.

(*p*) Ante, pp. 267—269.

(*q*) Ante, pp. 270—272.

(*r*) Ante, p. 70.

(*s*) Cruise on Fines, 108, 109.

in the land comprised in the fine. But without a fine, no conveyance could be made of the wife's lands; thus, she could not leave them by her will, even to her husband; although, by means of the Statute of Uses (*t*), a testamentary appointment of lands, in the nature of a will, might be made by the wife in favour of her husband in a manner to be hereafter explained (*u*). And in respect of the transfer of the wife's *legal* estates in land (*x*), the law remained unaltered until the commencement of the Married Women's Property Act, 1882 (*y*); although a change was made in the machinery for effecting conveyances of the lands of married women.

The cumbrous and expensive nature of fines having occasioned their abolition, provision was made by the Act for the abolition of Fines and Recoveries (*z*), for the conveyance by deed merely of the interests of married women in real estate. By this Act, every kind of conveyance or disclaimer of freehold estates which a woman could execute if unmarried might be made by her by a deed executed with her husband's concurrence (*a*): but the separate examination, which was before necessary in the case of a fine, was still retained; and every deed, executed under the provisions of the Act, was required to be produced and *acknowledged* by the wife as her own act and deed, before a judge of one of the superior Courts at Westminster, or of any County Court, or a master in Chancery, or two commissioners (*b*), who were required, before they received the acknowledgment, to examine her apart from her husband touching her knowledge of the deed, and to ascertain whether

Conveyance
by married
women under
Stat. 3 & 4
Will. IV.
c. 74.

The wife
n
a
the deed

27 Hen. VIII. c. 10, ante,
p. 188.

(*u*) See post, the chapter on
Executory Interests.

(*x*) See ante, pp. 192, 269.

(*y*) Ante, pp. 270—272; *Cahill*
v. *Cahill*, 8 App. Cas. 420.

(*z*) Stat. 3 & 4 Will. IV. c. 74;
ante, p. 71. See stat. 4 & 5
Will. IV. c. 92, as to Ireland.

(*a*) Sect. 77; stat. 8 & 9 Vict.
c. 106, s. 7.

(*b*) Stats. 3 & 4 Will. IV. c. 74,
s. 79; 19 & 20 Vict. c. 108, s. 73.

Certificate.

she freely and voluntarily consented thereto (*c*). The Act also required a certificate of the taking of such acknowledgment to be duly signed and filed (*d*), otherwise the acknowledgment was of no effect (*e*). But under the Conveyancing Act, 1882 (*f*), deeds executed by married women after the year 1882 may be acknowledged before one commissioner only; and a certificate of the acknowledgment of such deeds is not required (*g*). A statute (*h*) of the year 1854 removed doubts which might arise, in consequence of any person taking the acknowledgment being an interested party. It is now repealed and replaced by provisions of the Conveyancing Act, 1882 (*i*), so far as regards the acknowledgment of deeds executed after the year 1882 (*k*). By the Vendor and Purchaser Act, 1874 (*l*), when any freehold hereditament shall be vested in a married woman as a bare trustee (*m*), she may convey the same as if she were a feme sole (*n*). It is thought that, under the Married Women's Property Act, 1882 (*o*), a wife may now convey the legal as well as the equitable estate in any hereditaments, which belong to her as her separate property by virtue of that Act, without the concurrence of her husband and without the acknowledgment and other formalities previously necessary (*p*). It is enacted in the Settled Land Act, 1882 (*q*), that, where a married

A married woman bare trustee may convey as a feme sole.

Conveyance of wife's separate property.

Powers of wife under Settled Land Act, 1882.

(*c*) Stat. 3 & 4 Will. IV. c. 74, s. 80.

(*d*) Sects. 84—86.

(*e*) *Jolly v. Hancock*, 7 Ex. 820.

(*f*) Stat. 45 & 46 Vict. c. 39, s. 7.

(*g*) See Williams's Conveyancing Statutes, 281—285.

(*h*) Stat. 17 & 18 Vict. c. 75. See as to Ireland, stat. 41 Vict. c. 23.

(*i*) Stat. 45 & 46 Vict. c. 39,

7, sub-ss. 3—5.

(*k*) See Williams's Conveyancing Statutes, 282, 284.

(*l*) Stat. 37 & 38 Vict. c. 78, s. 6, passed 7th Aug. 1874.

(*m*) See ante, p. 141.

(*n*) See Williams's Conveyancing Statutes, 18—20.

(*o*) Ante, pp. 270—272.

(*p*) See Williams's Conveyancing Statutes, 382, 383, 386—388.

(*q*) Stat. 45 & 46 Vict. c. 38, s. 61, sub-ss. 2, 3.

woman who, if she had not been a married woman, would have been a tenant for life, or would have had the powers of a tenant for life under the foregoing provisions of this Act, is entitled for her separate use, or is entitled under any statute passed or to be passed for her separate property or as a feme sole, then she, without her husband, shall have the powers of a tenant for life under this Act (r); but that, where she is entitled otherwise than as aforesaid, then she and her husband together shall have the powers of a tenant for life under this Act (r). It is also provided (s) that a restraint on anticipation in the settlement shall not prevent the exercise by a married woman of any power under this Act.

2. As to the rights of the wife in the lands of her husband. A man's capacity for disposing of his own estates in land remains unchanged by the act of marriage; and during a husband's life, the law does not give to the wife any control over his powers of disposition or any interest in the rents and profits of his land. After her husband's death, however, a widow becomes, in some cases, entitled to a life interest in part of her late husband's lands. This interest is termed the *dower* of the wife. By the Act of Parliament for the amendment of the law relating to dower (t), the dower of women married after the 1st of January, 1834, was placed on a different footing from that of women who were married previously. But as the old law of dower continued to regulate the rights of all women who were married on or before that day, it will be desirable, in the first place, to give some account of the old law before proceeding to the new.

Rights of the wife in lands & husband.

Dower.

(r) See ante, pp. 35—38, 43—46, 49—54.

(s) Sect. 61, sub-s. 6.

(t) Stat. 3 & 4 Will. IV. c. 105.

Dower previously to the Act.

Dower, as it existed previously to the operation of the Dower Act, was of very ancient origin, and retained an inconvenient property which accrued to it in the simple times when alienation of lands was far less frequent than at present. If at any time during the coverture the husband became solely seised of any estate of inheritance, that is, fee simple or fee tail, in lands to which any issue, which the wife might have had, might by possibility have been heir (*u*), she from that time became entitled, on his decease, to have one equal third part of the same lands allotted to her, to be enjoyed by her in severalty during the remainder of her life (*x*). This right having once attached to the lands, adhered to them, notwithstanding any sale or devise which the husband might make. It consequently became necessary for the husband, whenever he wished to make a valid conveyance of his lands, to obtain the concurrence of his wife, for the purpose of releasing her right to dower. This release could be effected only by means of a fine, in which the wife was separately examined. And when, as often happened, the wife's concurrence was not obtained on account of the expense involved in levying a fine, a defect in the title obviously existed so long as the wife lived. As the right to dower was paramount to the alienation of the husband, so it was quite independent of his debts, even of those owing to the crown (*y*). It was necessary, however, that the husband should be seised of an estate of inheritance at law; for the Court of Chancery, whilst it allowed to husbands curtesy of their wives' equitable estates, withheld from wives a like privilege of dower out of the equitable estates of their husbands (*z*). The estate, moreover, must have been held

Dower could only be released by fine.

Dower independent of husband's debts.

A legal seisin required.

(*u*) Litt. ss. 36, 53; 2 Black. Com. 131; 1 Roper's Husband and Wife, 332.

(*x*) See *Dickin v. Hamer*, 1 Drew. & Smale, 284.

(*y*) Co. Litt. 31 a; 1 Roper's Husband and Wife, 411.

(*z*) 1 Roper's Husband and Wife, 354.

in severalty or in common, and not in joint tenancy: Estate must not be joint.
 for the unity of interest which characterizes a joint tenancy forbids the intrusion into such a tenancy of the husband or wife of any deceased joint tenant; on the decease of any joint tenant, his surviving companions are already entitled, under the original gift, to the whole subject of the tenancy (a). The estate was also required to be an estate of inheritance in possession; although a seisin in law, obtained by the husband, was sufficient to cause his wife's right of dower to attach (b). In no case, also, was any issue required to be actually born; it was sufficient that the wife might have had issue who might have inherited. Dower of
 The dower of the widow in gavelkind lands consisted, and still consists, like the husband's curtesy, of a moiety, and continues only so long as she remains unmarried and chaste (c).

In order to prevent this inconvenient right from attaching on newly-purchased lands, and to enable the purchaser to make a title at a future time, without his wife's concurrence, various devices were resorted to in the framing of purchase-deeds. The old-fashioned Old method
 method of barring dower was to take the conveyance to the purchaser and his heirs, to the use of the purchaser and a trustee and the heirs of the purchaser; but, as to the estate of the trustee, it was declared to be in trust only for the purchaser and his heirs. By this means the purchaser and the trustee became joint tenants for life of the legal estate, and the remainder of the inheritance belonged to the purchaser. If, therefore, the purchaser died during the life of his trustee, the latter acquired in law an estate for life by survivorship; and as the husband had never been solely seised, the wife's

(a) Ibid. 366; ante, p. 164 et seq.

(b) Co. Litt. 31 a.

(c) Bac. Abr. tit. Gavelkind (A); Rob. Gav. book 2, c. 2.

dower never arose; whilst the estate for life of the trustee was subject in equity to any disposition which the husband might think fit to make by his will. The husband and his trustee might also, at any time during their joint lives, make a valid conveyance to a purchaser without the wife's concurrence. The defect of the plan was, that if the trustee happened to die during the husband's life, the latter became at once solely seised of an estate in fee simple in possession; and the wife's right to dower accordingly attached. Moreover, the husband could never make any conveyance of an estate in fee simple without the concurrence of his trustee so long as he lived. This plan, therefore, gave way to another method of framing purchase-deeds, which will be hereafter explained (*d*), and by means of which the wife's dower under the old law was effectually barred, whilst the husband alone, without the concurrence of any other person, could effectually convey the lands.

Jointure.

The right of dower might have been barred altogether by a *jointure*, agreed to be accepted by the intended wife previously to marriage, in lieu of dower. This jointure was either legal or equitable. A legal jointure was first authorized by the Statute of Uses (*e*), which, by turning uses into legal estates, of course render them liable to dower. Under the provisions of this statute, dower may be barred by the wife's acceptance previously to marriage, and in satisfaction of her dower, of a competent livelihood of freehold lands and tenements, to take effect in profit or possession presently after the death of the husband for the life of the wife at least (*f*). If the jointure were made after marriage, the wife might elect between her dower and her jointure (*g*).

(*d*) See post, the chapter on Executory Interests. Com. 137; 1 Roper's Husband and Wife, 462.

(*e*) 27 Hen. VIII. c. 10.

(*f*) Co. Litt. 36 b; 2 Black.

(*g*) 1 Roper's Husband and Wife, 468.

A legal jointure, however, was in modern times seldom resorted to as a method of barring dower: when any jointure was made, it was usually merely of an equitable kind; for if the intended wife were of age, and a party to the settlement, she was competent, in equity, to extinguish her title to dower upon any terms to which she might think proper to agree (*h*). And if the wife should have accepted an equitable jointure, the Courts of equity would effectually restrain her from setting up any claim to her dower. But in equity, as well as at law, the jointure, in order to be an absolute bar of dower, was required to be made before marriage. Equitable jointure.

The dower of women married since the 1st of January, 1834, may be barred by the acceptance of a jointure in the same manner as before; but, in their case, the doctrine of jointures is of very little moment. For, by the Act for the amendment of the law relating to dower (*i*), the dower of such women has been placed completely within the power of their husbands. Under the Act no widow is entitled to dower out of any land which shall have been absolutely disposed of by her husband in his lifetime or by his will (*k*). And all partial estates and interests, and all charges created by any disposition or will of the husband, and all debts, incumbrances, contracts and engagements to which his lands may be liable, shall be effectual as against the right of his widow to dower (*l*). The husband may also either wholly or par- Dower under the Act.

(*h*) Ibid. 488; *Dyke v. Rendall*, 2 De G., M. & G. 209.

(*i*) 3 & 4 Will. IV. c. 105. Gavelkind lands are within the Act, *Farley v. Bonham*, 2 John. & H. 177.

(*k*) 3 & 4 Will. IV. c. 105, s. 4. In the recent case of *Rowland v. Cuthbertson*, M. R., Law Rep., 8 Eq. 466, the late Lord Romilly expressed an opinion that a mere

general devise of lands was insufficient to bar the dower of the testator's widow in any of his lands included in such devise. But the contrary has since been decided, *Lacey v. Hill*, M. R., Law Rep., 19 Eq. 346; 23 W. R. 285.

(*l*) Sect. 5; *Jones v. Jones*, 4 Kay & J. 361.

Declaration
against
dower.

tially deprive his wife of her right to dower, by any declaration for that purpose made by him, by any deed, or by his will (*m*). As some small compensation for these sacrifices, the Act has granted a right of dower out of lands to which the husband had a right merely without having had even a legal seisin (*n*); dower is also extended to equitable as well as legal estates of inheritance in possession, excepting of course estates in joint tenancy (*o*). The effect of the Act is evidently to deprive the wife of her dower, except as against her husband's heir at law. If the husband should die intestate, and possessed of any lands, the wife's dower out of such lands is still left her for her support,—unless, indeed, the husband should have executed a declaration to the contrary. A declaration of this kind has, unfortunately, found its way, as a sort of common form, into many purchase-deeds. Its insertion seems to have arisen from a remembrance of the troublesome nature of dower under the old law, united possibly with some misapprehension of the effect of the new enactment. But, surely, if the estate be allowed to descend, the claim of the wife is at least equal to that of the heir, supposing him a descendant of the husband; and far superior, if the heir be a lineal ancestor, or remote relation (*p*). The proper method seems therefore to be, to omit any such declaration against dower, and so to leave to the widow a prospect of sharing in the lands, in case her lord shall not think proper to dispose of them.

Leases by
tenant in
dower.

The Settled Estates Act, 1877, now empowers every person entitled to the possession or the receipt of the

(*m*) Sects. 6, 7, 8. See *Fry v. Noble*, 20 Beav. 598; 7 De Gex, M. & G. 687.

(*n*) Sect. 3.

(*o*) Sect. 2; *Fry v. Noble*, 20 Beav. 598; *Clarke v. Franklin*, 4 Kay & J. 266.

(*p*) Sugd. Vend. & Pur. 545, 11th ed.

rents and profits of any unsettled estate as tenant in dower, to grant leases not exceeding twenty-one years as to estates in England and thirty-five years as to estates in Ireland, in the same manner as a tenant by the curtesy, or a tenant for life under a settlement made after the first of November, 1856 (*q*).

An action for dower, like other real actions, was formerly commenced in the Court of Common Pleas; and when real actions were abolished in the year 1833 (*r*) writs for the recovery of dower were excepted. By an Act of 1860 these writs were abolished (*s*), and the action was commenced by writ of summons issuing out of the Court of Common Pleas, in the same manner as the writ of summons in an ordinary action; and the proceedings were the same as in ordinary actions commenced by writ of summons (*t*). A widow's dower might also have been recovered by bill in equity (*u*). And under the Judicature Act, 1873 (*x*), the jurisdiction of the Courts of Common Pleas and Chancery is now vested in the High Court of Justice, in which claims for dower are brought by action in the ordinary form (*y*).

(*q*) Stat. 40 & 41 Vict. c. 18, s. 46. See ante, pp. 34, 277.

(*r*) By stat. 3 & 4 Will. IV. c. 27, s. 36.

(*s*) Stat. 23 & 24 Vict. c. 126, s. 26.

(*t*) Sect. 27; repealed by stat. 46 & 47 Vict. c. 49.

(*u*) See *Anderson v. Pignet*, L. R., 11 Eq. 329, reversed on appeal, L. R., 8 Ch. 180; 21 W. R. 150, and the cases there cited.

(*x*) Stat. 36 & 37 Vict. c. 66.

(*y*) See Rules of the Supreme Court, 1883, Appendix A. Pt. III. s. 4.

PART II.

OF INCORPOREAL HEREDITAMENTS.

Incorporeal
property.

Lay in grant.

Our attention has hitherto been directed to real property of a corporeal kind. We have considered the usual estates which may be held in such property,—the mode of descent of such estates as are inheritable,—the tenure by which estates in fee simple are holden,—and the usual method of the alienation of such estates, whether in the lifetime of the owner or by his will. We have also noticed the modification in the right and manner of alienation formerly produced by the relation of husband and wife. Besides corporeal property, we have seen (*a*) that there exists also another kind of property, which, not being of a visible and tangible nature, is denominated *incorporeal*. This kind of property, though it may accompany that which is corporeal, yet does not in itself admit of actual delivery. When, therefore, it was required to be transferred as a separate subject of property, it was always conveyed, in ancient times, by writing, that is, by deed; for we have seen (*b*), that formerly all legal writings were in fact deeds. Property of an incorporeal kind was, therefore, said to lie in *grant*, whilst corporeal property was said to lie in *livery* (*c*). For the word *grant*, though it comprehends all kinds of conveyances, yet more strictly and properly taken, is a conveyance by deed only (*d*). And *livery*, as we have seen (*e*), is the technical name for that delivery which was made of the seisin, or feudal posses-

(*a*) Ante, p. 12.

(*b*) Ante, p. 179.

(*c*) Co. Litt. 9 a.

(*d*) Shep. Touch. 228.

(*e*) Ante, p. 173.

sion, on every feoffment of lands and houses, or corporeal hereditaments. In this difference in the ancient mode of transfer accordingly lay the chief distinction between these two classes of property. But as we have seen (*f*), ^{New ment.} the Act to amend the law of real property now provides that all corporeal tenements and hereditaments shall, as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant as well as in livery (*g*). There is, accordingly, now no practical difference in this respect between the two classes; and the lease for a year stamp, to which a grant of corporeal hereditaments had been previously subject, was abolished by the Stamp Act of 1850 (*h*).

(*f*) Ante, p. 217.

(*h*) Stat. 13 & 14 Vict. c. 97.

(*g*) Stat. 8 & 9 Vict. c. 106, s. 2.

CHAPTER I.

OF A REVERSION AND A VESTED REMAINDER.

THE first kind of incorporeal hereditament which we shall mention is somewhat of a mixed nature, being at one time incorporeal, at another not; and, for this reason, it is not usually classed with those hereditaments which are essentially and entirely of an incorporeal kind. But as this hereditament partakes, during its existence, very strongly of the nature and attributes of other incorporeal hereditaments, particularly in its always permitting, and generally requiring, a deed of grant for its transfer,—it is here classed with such hereditaments. It is called, according to the mode of its creation, a *reversion* or a *vested remainder*.

If a tenant in fee simple should grant to another person a lease for a term of years, or for life, or even if he should grant an estate tail, it is evident that he will not thereby dispose of all his interest; for in each case, his grantee has a less estate than himself. Accordingly, on the expiration of the term of years, or on the decease of the tenant for life, or on the decease of the donee in tail without having barred his estate tail and without issue, the remaining interest of the tenant in fee will *revert* to himself or his heirs, and he or his heir will again become tenant in fee simple in possession. The smaller estate which he has so granted is called, during its continuance, the *particular* estate, being only a part, or *particula*, of the estate in fee (a). And, during the continuance of such particular estate, the interest of

Particular
estate.

(a) 2 Black. Com. 165.

the tenant in fee simple, which still remains undisposed of—that is, his present estate, in virtue of which he is to have again the possession at some future time—is called his *reversion* (b).

Reversion.

If at the same time with the grant of the particular estate, he should also dispose of this remaining interest or *reversion*, or any part thereof, to some other person, it then changes its name, and is termed, not a *reversion*, but a *remainder* (c). Thus, if a grant be made by A., a tenant in fee simple, to B. for life, and after his decease to C. and his heirs, the whole fee simple of A. will be disposed of, and C.'s interest will be termed a *remainder*, expectant on the decease of B. A remainder, therefore, always has its origin in express grant: a reversion merely arises incidentally, in consequence of the grant of the particular estate. It is created simply by the law, whilst a remainder springs from the act of the parties (d).

Remainder.

A remainder
arises
by
express grant.

1. And, first, of a reversion. If the tenant in fee simple should have made a lease merely for a term of years, his reversion is looked on, in law, precisely as a continuance of his old estate, with respect to himself and his heirs, and to all other persons but the tenant for years. The owner of the fee simple is regarded as having simply placed a bailiff on his property (e) and the consequence is, that, subject to the lease, the owner's rights of alienation remain unimpaired, and may be exercised in the same manner as before. The feudal possession or *seisin* has not been parted with. And a conveyance of the reversion may, therefore, be made by a feoffment with livery of *seisin*, made with the consent of the tenant for years (f). But, if this mode of

A reversion
on a lease for
years

may be con-
veyed by
feoffment

or by deed of
grant.

(b) Co. Litt. 22 b, 142 b.

(c) Litt. ss. 215, 217.

2 Black. Com. 163.

(e) Watk. Descents, 108 (113,
4th ed.).

(f) Co. Litt. 48 b, n. (8).

A reversion
on a lease for
life

must be con-
veyed by deed
of grant.

Fealty and
rent.

Rent service.

transfer should not be thought eligible, a grant by deed will be equally efficacious. For the estate of the grantor is strictly incorporeal, the tenant for years having the actual possession of the lands: so long, therefore, as such actual possession continues, the estate in fee simple is strictly an incorporeal reversion, which, together with the *seisin* or feudal possession, may be conveyed by deed of grant (*g*). But, if the tenant in fee simple should have made a lease for life he must have parted with his *seisin* to the tenant for life; for, an estate for life is an estate of freehold, and such tenant for life will, therefore, during his life, continue to be the freeholder, or holder of the feudal *seisin* (*h*). No feoffment can consequently be made by the tenant in fee simple; for he has no *seisin* of which to make livery. His reversion is but a fragment of his old estate, and remains purely incorporeal, until, by the dropping of the life of the grantee, it shall again become an estate in possession. Till then, that is, so long as it remains a reversion expectant on an estate of freehold, it can only be conveyed, like all other incorporeal hereditaments when apart from what is corporeal, by a deed of grant (*i*).

We have before mentioned (*k*), that, in the case of a lease for life or years, a tenure is created between the parties, the lessee becoming tenant to the lessor. To this tenure are usually incident two things, *fealty* (*l*) and *rent*. The oath of fealty is now never exacted; but the rent, which may be reserved, is of practical importance. This rent is called in law *rent service* (*m*) in order to distinguish it from other kinds of rent, to

(*g*) Perkins, s. 221; *Doe* d. *Were* v. *Cole*, 7 Barn. & Cress. 243, 248; ante, p. 217.

(*h*) Watk. Descents, 109 (114, 4th ed.): ante, p. 172.

(*i*) Shep. Touch. 230.

(*k*) Ante, p. 143.

(*l*) Ante, pp. 143, 155.

(*m*) Co. Litt. 142 a.

be spoken of hereafter, which have nothing to do with the services anciently rendered by a tenant to his lord. It consists, usually, but not necessarily, of money; for, it may be rendered in corn, or in anything else. Thus, an annual rent of one peppercorn is sometimes reserved to be paid, when demanded, in cases where it is wished that lands should be holden rent free, and yet that the landlord should be able at any time to obtain from his tenant an acknowledgment of his tenancy. To the reservation of a rent service, a deed was formerly not absolutely necessary (*n*). For, although the rent is an incorporeal hereditament, yet the law considered that the same ceremony, by which the nature and duration of the estate were fixed and evidenced, was sufficient also to ascertain the rent to be paid for it. But, by the Act to amend the law of real property (*o*), it is provided, that a lease, required by law to be in writing, of any tenements or hereditaments shall be void at law, unless made by deed. In every case, therefore, where the Statute of Frauds (*p*) has required leases to be in writing, they must now be made by deed. But, according to the exception in that statute (*q*), where the lease does not exceed three years from the making, a rent of two-thirds of the full improved value, or more, may still be reserved by parol merely. Rent service, when created, is considered to be issuing out of every part of the land in respect of which it is paid (*r*): one part of the land is as much subject to it as another. For the recovery of rent service, the well known remedy is by *distress* and sale of the goods of the tenant, or any other person, found on any part of the premises. This remedy for the recovery of rent service belongs to the landlord of common right, without any express agree-

A deed formerly not necessary for the reservation of a rent.

Act to

Rent issues

(*n*) Litt. s. 214; Co. Litt. 143 a.
 (*o*) Stat. 8 & 9 Vict. c. 106, s. 3,
 repealing stat. 7 & 8 Vict. c. 76,
 s. 4, to the same effect.

(*p*) Stat. 29 Car. II. c. 3, ante,
 p. 183.
 (*q*) Sect. 2.
 (*r*) Co. Litt. 47 a, 142 a.

ment (*s*). In modern times it has been extended and facilitated by various Acts of Parliament (*t*).

Condition of
re-entry.

Demand for-
merly re-
quired.

Modern pro-
ceedings.

In addition to the remedy by distress, there is usually contained in leases a condition of re-entry, empowering the landlord, in default of payment of the rent for a certain time, to re-enter on the premises and hold them as of his former estate. When such a condition is inserted, the estate of the tenant, whether for life or years, becomes determinable on such re-entry. In former times, before any entry could be made under a proviso or condition for re-entry on non-payment of rent, the landlord was required to make a demand, upon the premises, of the precise rent due, at a convenient time before sunset of the last day when the rent could be paid according to the condition; thus, if the proviso were for re-entry on non-payment of the rent by the space of thirty days, the demand must have been made on the evening of the thirtieth day (*u*). But now, if half a year's rent is due, and no sufficient distress is found on the premises, the landlord may, at the expiration of the period limited by the proviso for re-entry (*x*), recover the premises by action, without any formal demand or entry (*y*); but all proceedings are to cease on payment by the tenant of all arrears and costs, at any time before the trial (*z*). Formerly

(*s*) Litt. ss. 213, 214. It must be made between sunrise and sunset, *Tutton v. Darke*, 5 H. & N. 647.

(*t*) Stat. 2 Wm. & Mary, c. 5; 8 Anne, c. 14; 4 Geo. II. c. 28; and 11 Geo. II. c. 19; Co. Litt. 47 b, n. (7); stat. 3 & 4 Will. IV. c. 42, ss. 37, 38; 14 & 15 Vict. c. 25, s. 2; see also stats. 34 & 35 Vict. c. 79, passed for the protection of the goods of lodgers; 35 & 36 Vict. c. 50, for the pro-

tection of railway rolling stock; 46 & 47 Vict. c. 61, ss. 44—55, limiting the right to distrain upon agricultural holdings.

(*u*) 1 Wms. Saund. 287, n. (16); *Acocks v. Phillips*, 5 H. & N. 183.

(*x*) *Doe d. Dixon v. Roe*, 7 C. B. 134.

(*y*) Stat. 15 & 16 Vict. c. 76, s. 210, re-enacting stat. 4 Geo. II. c. 28, s. 2. See Rules of the Supreme Court, 1883, Ord. III. r. 6.

(*z*) Stat. 15 & 16 Vict. c. 76,

also the tenant might, at an indefinite time after he had been ejected, have filed his bill in the Court of Chancery, and he would have been relieved by that Court from the forfeiture he had incurred, on his payment to his landlord of all arrears and costs. But by a statute of the present reign, the right of the tenant to apply for relief in equity was restricted to six calendar months next after the execution of the judgment on the ejectment (*a*); and by a more recent statute, the same relief was allowed to be given by the Courts of Law (*b*). In ancient times, also, the benefit of a condition of re-entry could belong only to the landlord and his heirs; for the law would not allow of the transfer of a mere conditional right to put an end to the estate of another (*c*). A right of re-entry was considered in the same light as a right to bring an action for money due; which right in ancient times was not assignable. This doctrine sometimes occasioned considerable inconvenience; and in the reign of Henry VIII. it was found to press hardly on the grantees from the crown of the lands of the dissolved monasteries. For these grantees were of course unable to take advantage of the conditions of re-entry, which the monks had inserted in the leases of their tenants. A parliamentary remedy was, therefore, applied for the benefit of the favourites of the crown; and the opportunity was taken for making the same provision for the public at large. A statute was accordingly passed (*d*), which enacts, that as well the grantees of the crown as all other persons being grantees (*e*) or assignees, their heirs,

The benefit of a condition of re-entry formerly inalienable.

Remedy by statute.

s. 212, re-enacting stat. 4 Geo. II. c. 28, s. 4. An under-tenant has the same privilege, *Doe d. Wyatt v. Byron*, 1 C. B. 623.

(*a*) Stat. 15 & 16 Vict. c. 76, s. 210, re-enacting stat. 4 Geo. II. c. 28, s. 2; *Bowser v. Colby*, 1 Hare, 109.

(*b*) Stat. 23 & 24 Vict. c. 126,

s. 1.

(*c*) Litt. ss. 347, 348; Co. Litt. 265 a, n. (1).

(*d*) Stat. 32 Hen. VIII. c. 34; Co. Litt. 215 a; *Isherwood v. Oldknow*, 3 Mau. & Selw. 382, 394.

(*e*) A lessee of the reversion is within the Act, *Wright v. Burroughes*, 3 C. B. 685.

executors, successors and assigns, shall have the like advantages against the lessees, by entry for non-payment of rent, or for doing of waste, or other forfeiture, as the lessors or grantors themselves, or their heirs or successors, might at any time have had or enjoyed; and this statute is still in force. It is also enacted by the Conveyancing and Law of Property Act, 1881, with regard only to leases made after the 31st December, 1881 (*f*), that rent reserved by a lease, and the benefit of every covenant or provision therein contained, having reference to the subject-matter thereof, and on the lessee's part to be observed or performed, and every condition of re-entry and other condition therein contained, shall be annexed and incident to and shall go with the reversionary estate in the land, or in any part thereof, immediately expectant on the term granted by the lease, notwithstanding severance of that reversionary estate, and shall be capable of being recovered, received, enforced and taken advantage of by the person from time to time entitled, subject to the term, to the income of the whole or any part, as the case may require, of the land leased. There exist also further means for the recovery of rent in certain actions at law, which the landlord may bring against his tenant for obtaining payment.

Actions at
law.

Rent service
passes by
grant of the
reversion.

Attornment.

Rent service, being incident to the reversion, passes by a grant of such reversion without the necessity of any express mention of the rent (*g*). Formerly no grant could be made of any reversion without the consent of the tenant, expressed by what was called his *attornment* to his new landlord (*h*). It was thought reasonable that a tenant should not have a new landlord imposed upon him without his consent; for, in

(*f*) Stat. 44 & 45 Vict. c. 41,
s. 10. See Williams's Convey-
ancing Statutes, 104—109.

Litt. ss. 228, 229, 572;
Perk. s. 113.

(*h*) Litt. ss. 551, 567, 568, 569;
Co. Litt. 309 a, n. (1).

early times, the relation of lord and tenant was of a much more personal nature than it is at present. The tenant, therefore, was able to prevent his lord from making a conveyance to any person whom he did not choose to accept as a landlord; for he could refuse to attorn tenant to the purchaser, and without attornment the grant was invalid. The landlord, however, had it always in his power to convey his reversion by the expensive process of a *fine* duly levied in the Court of Common Pleas; for this method of conveyance, being judicial in its nature, was carried into effect without the tenant's concurrence; and the attornment of the tenant, which for many purposes was desirable, could in such case be compelled (*i*). It can easily be imagined, that a doctrine such as this was found inconvenient when the rent paid by the tenant became the only service of any benefit rendered to the landlord. The necessity of attornment to the validity of the grant of a reversion was accordingly abolished by a statute passed in the reign of Queen Anne (*j*). But the statute very properly provides (*k*), that no tenant shall be prejudiced or damaged by payment of his rent to the grantor, or by breach of any condition for nonpayment of rent, before notice of the grant shall be given to him by the grantee. And by a further statute (*l*), any attornment which may be made by tenants without their landlord's consent, to strangers claiming title to the estate of their landlords, is rendered null and void. Nothing, therefore, is now necessary for the valid conveyance of any rent service, but a grant by deed of the reversion, to which such rent is incident. When the conveyance is made to the tenant himself, it is called a *release* (*m*).

Attornment
abolished.

(*i*) Shep. Touch. 254.

(*k*) Sect. 10.

(*j*) Stat. 4 & 5 Anne, c. 3 (c. 16 in Ruffhead), s. 9. See *Allcock v. Moorhouse*, 9 Q. B. D. 366.

(*l*) Stat. 11 Geo. II. c. 19, s. 1

(*m*) Ante, p. 218.

Rent formerly lost by destruction of the reversion.

Merger.

Leases surrendered in order to be renewed.

Act to amend the law of real property.

The doctrine, that rent service, being incident to the reversion, always follows such reversion, formerly gave rise to the curious and unpleasant consequence of the rent being sometimes lost when the reversion was destroyed. For it is possible, under certain circumstances, that an estate may be destroyed and cease to exist. For instance, suppose A. to have been a tenant of lands for a term of years, and B. to have been his undertenant for a less term of years at a certain rent; this rent was an incident of A.'s reversion, that is, of the term of years belonging to A. If, then, A.'s term should by any means have been destroyed, the rent paid to him by B. would, as an incident of such term, have been destroyed also. Now, by the rules of law, a conveyance of the immediate fee simple to A. would at once have destroyed his term,—it not being possible that the term of years and the estate in fee simple should subsist together. In legal language the term of years would have been *merged* in the larger estate in fee simple; and the term being merged and gone, it followed as a necessary consequence, that all its incidents, of which B.'s rent was one, ceased also (*n*). This unpleasant result was some time since provided for and obviated with respect to leases surrendered in order to be renewed,—the owners of the new leases being invested with the same right to the rent of undertenants, and the same remedy for recovery thereof, as if the original leases had been kept on foot (*o*). But in all other cases the inconvenience continued, until a remedy was provided by the Act to simplify the transfer of property (*p*). This Act, however, was shortly afterwards repealed by the Act to amend the law of real property (*q*), which provides, in a more efficient though somewhat crabbed

(*n*) *Webb v. Russell*, 3 T. R. 393.

(*o*) Stat. 4 Geo. II. c. 28, s. 6; 3 Prest. Conv. 138; *Cousins v.*

3 Hurlst. & Colt. 892;

extended to crown lands by stat. 8 & 9 Vict. c. 99, s. 7.

(*p*) Stat. 7 & 8 Vict. c. 76, s. 12.

(*q*) Stat. 8 & 9 Vict. c. 106.

clause (r), that, when the reversion expectant on a lease, made either before or after the passing of the Act, of any tenements or hereditaments of any tenure, shall, after the 1st of October, 1845, be surrendered or merge, the estate, which shall for the time being confer, as against the tenant under the same lease, the next vested right to the same tenements or hereditaments, shall, to the extent and for the purpose of preserving such incidents to and obligations on the same reversion as but for the surrender or merger thereof would have subsisted, be deemed the reversion expectant on the same lease.

2. A remainder chiefly differs from a reversion in this,—that between the owner of the particular estate and the owner of the remainder (called the remainderman) no tenure exists. They both derive their estates from the same source, the grant of the owner in fee simple ; and one of them has no more right to be lord than the other. But as all estates must be holden of some person,—in the case of a grant of a particular estate with a remainder in fee simple,—the particular tenant and the remainderman both hold their estates of the same chief lord as their grantor held before (s). It consequently follows, that no rent service is incident to a remainder, as it usually is to a reversion ; for rent service is an incident of tenure, and in this case no tenure exists. The other point of difference between a reversion and a remainder we have already noticed (t), namely, that a reversion arises necessarily from the grant of the particular estate, being simply that part of the estate of the grantor which remains undisposed of, but a remainder is always itself created by an express grant.

We have seen that the powers of alienation possessed by a tenant in fee simple enable him to make a lease for

A remainder.

No tenure between remainderman.

No rent service.

Powers of alienation

(r) Sect. 9.

(s) Litt. s. 215.

(t) Ante, p. 291.

may be exercised concurrently.

a term of years, or for life, or a gift in tail, as well as to grant an estate in fee simple. But these powers are not simply in the alternative, for he may exercise all these powers of alienation at one and the same moment; provided, of course, that his grantees come in one at a time, in some prescribed order, the one waiting for liberty to enter until the estate of the other is determined. In such a case the ordinary mode of conveyance is alone made use of; and until the passing of the Act to amend the law of real property (*u*), if a feoffment should have been employed, there would have been no occasion for a *deed* to limit or mark out the estates of those who could not have immediate possession (*v*). The seisin would have been delivered to the first person who was to have possession (*x*); and if such person was to have been only a tenant for a term of years, such seisin would have immediately vested in the prescribed owner of the first estate of freehold, whose bailiff the tenant for years is accounted to be. From such first freeholder, on the determination of his estate, the seisin, by whatever means vested in him, will devolve on the other grantees of freehold estates in the order in which their estates are limited to come into possession. So long as a regular order is thus laid down, in which the possession of the lands may devolve, it matters not how many kinds of estates are granted, or on how many persons the same estate is bestowed. Thus, a grant may be made at once to fifty different people separately for their lives. In such case the grantee for life who is first to have the possession is the particular tenant to whom, on a feoffment, seisin would be delivered, and all the rest are remaindermen; whilst the reversion in fee simple, expectant on the decease of them all, remains with the grantor. The second grantee for life has a

Example.

(*u*) Stat. 8 & 9 Vict. c. 106,
s. 3; ante, p. 183.

(*x*) Litt. s. 60; 2 Black. Com.
167.

(*v*) Litt. s. 60; Co. Litt. 143 a.

remainder expectant on the decease of the first, and will be entitled to possession on the determination of the estate of the first, either by his decease, or in case of his forfeiture, or otherwise. The third grantee must wait till the estate both of the first and second shall have determined; and so of the rest. The mode in which such a set of estates would be marked out is as follows:—To A. for his life, and after his decease to B. for his life, and after his decease to C. for his life, and so on. This method of limitation is quite sufficient for the purpose, although it by no means expresses all that is meant. The estates of B. and C. and the rest are intended to be as immediately and effectually vested in them, as the estate of A.; so that if A. were to forfeit his estate, B. would have an immediate right to the possession: and so again C. would have a right to enter, whenever the estates both of A. and B. might determine. But, owing to the necessary infirmity of language, all this cannot be expressed in the limitations of every ordinary deed. The words “and after his decease” are, therefore, considered a sufficient expression of an intention to confer a vested remainder after an estate for life. In the case we have selected of numerous estates, every one given only for the life of each grantee, it is manifest that very many of the grantees can derive no benefit; and should the first grantee survive all the others, and not forfeit his estate, not one of them will take anything. Nevertheless, each one of these grantees has an estate for life in remainder, immediately *vested* in him; and each of these remainders is capable of being transferred, both at law and in equity, by a deed of grant, in the same manner as a reversion. In the same way, a grant may be made of a term of years to one person, an estate for life to another, an estate in tail to a third, and last of all an estate in fee simple to a fourth; and these grantees may be entitled to possession in any prescribed order, except as to the grantee of the estate in fee simple,

Words used
to confer a
vested re-
mainder after
a life interest.

A vested re-
mainder may
be conveyed
by deed of
grant.

Definition of
a vested re-
mainder.

who must necessarily come last ; for his estate, if not literally interminable, yet carries with it an interminable power of alienation, which would keep all the other grantees for ever out of possession. But the estate tail may come first into possession, then the estate for life, and then the term of years ; or the order may be reversed, and the term of years come first, then the estate for life, then the estate tail, and lastly the estate in fee simple, which, as we have said, must wait for possession till all the others shall have been determined. When a remainder comes after an estate tail, it is liable to be barred by the tenant in tail, as we have already seen. This risk it must run. But, if any estate, be it ever so small, is always ready, from its commencement to its end, to come into possession the moment the prior estates, be they what they may, happen to determine,—it is then a *vested remainder*, and recognized in law as an estate grantable by deed (y). It would be an estate in possession, were it not that other estates have a prior claim ; and their priority alone postpones, or perhaps may entirely prevent, possession being taken by the remainderman. The gift is immediate ; but the enjoyment must necessarily depend on the determination of the estates of those who have a prior right to the possession.

One person
may have
more than
one estate.

In all the cases which we have as yet considered, each of the remainders has belonged to a different person. No one person has had more than one estate. A., B. and C. may each have had estates for life ; or the one may have had a term of years, the other an estate for life, and the last a remainder in tail or in fee simple. But no one of them has as yet had more than one estate. It is possible, however, that one person may have, under certain circumstances, more than one estate in the same land at the same time,—one of his estates

(y) Fearne, Cont. Rem. 216 ; 2 Prest. Abst. 113.

being in possession, and the other in remainder, or perhaps all of them being remainders. The limitation of a remainder in tail, or in fee simple to a person who has already an estate of freehold, as for life, is governed by a rule of law, known by the name of the rule in *Shelley's case*,—so called from a celebrated case in Lord Coke's time, in which the subject was much discussed (z),—although the rule itself is of very ancient date (a). As this rule is generally supposed to be highly technical, and founded on principles not easily to be perceived, it may be well to proceed gradually in the attempt to explain it.

Rule in *Shelley's case*.

We have seen that, according to the conception developed in feudal law, a grant of land was essentially meant for the personal enjoyment of the grantee, whose interest therefore ceased on his death; when the land reverted to the grantor, unless the grant of the estate should have conferred on the grantee's heirs a right to succeed to the enjoyment of their ancestor's holding. Also that, even if an hereditary estate had been granted, the tenant in possession of the land was regarded as personally taking a life interest only. These conceptions seem to have been imported into English law along with the principle of tenure (b). And to the present day a grant or conveyance of lands, made by any instrument (a will only excepted), to A. B. simply, without further words, will give him an estate for his life, and no longer. If in early times after the Conquest a grant of land were made to a man and his heirs, his heir, on his death, became entitled; and it was not in the power of the ancestor to prevent the descent of his estate accordingly. He could not sell it without the consent of his

Grantee of a fee simple taking only a personal interest.

(z) *Shelley's case*, 1 Rep. 94, 104. 944, n. (c); 38 Edw. III. 26 b; 40 Edw. III. 9.

(a) Year Book, 18 Edw. II. 577, translated 7 Man. & Gran. (b) See ante, pp. 21—24, and note (c) to p. 21.

To A. for his life, and after his decease to his heirs.

Words of limitation.

lord; much less could he then devise it by his will. The ownership of an estate in fee simple was then but little more advantageous than the possession of a life interest at the present day. The powers of alienation belonging to such ownership, together with the liabilities to which it is subject, have almost all been of slow and gradual growth, as has already been pointed out in different parts of the preceding chapters (c). A tenant in fee simple was, accordingly, a person who held to him and his heirs; that is, the land was given to him to hold for his life, and to his heirs, to hold after his decease. It cannot, therefore, be wondered at, that a gift, expressly in these terms, "To A. for his life, and after his decease to his heirs," should have been anciently regarded as identical with a gift to A. and his heirs, that is, a gift in fee simple. Nor, if such was the law formerly, can it be matter of surprise that the same rule should have continued to prevail up to the present time. Such indeed has been the case. Notwithstanding the vast power of alienation now possessed by a tenant in fee simple, and the great liability of such an estate to involuntary alienation for the purpose of satisfying the debts of the present tenant, the same rule still holds; and a grant to A. for his life, and after his decease to his heirs, will now convey to him an estate in fee simple, with all its incidents; and in the same manner a grant to A. for his life, and after his decease to the heirs of his body, will now convey to him an estate tail as effectually as a grant to him and the heirs of his body. In these cases, therefore, as well as in ordinary limitations to A. and his heirs, or to A. and the heirs of his body, the words *heirs*, and *heirs of his body*, are said to be *words of limitation*; that is, words which limit or mark out the estate to be taken by the grantee (d). At the present day,

(c) Ante, pp. 23, 24, 59—64, 83—86.

(d) See ante, pp. 174—176; *Perrin v. Blake*, ante, p. 255.

when the heir is perhaps the last person likely to get the estate, these words of limitation are regarded simply as formal means of conferring powers and privileges on the grantee—as mere technicalities, and nothing more. But, in ancient times, these same words of limitation really meant what they said, and gave the estate to the heirs, or the heirs of the body of the grantee, after his decease, according to the letter of the gift. The circumstance, that a man's estate was to go to his heir, was the very thing which, afterwards, enabled him to convey to another an estate in fee simple (c). And the circumstance, that it was to go to the heir of his body, was that which alone enabled him, in after times, to bar an estate tail and dispose of the lands entailed by means of a common recovery.

Having proceeded thus far, we have already mastered the first branch of the rule in *Shelley's case*, namely, that which relates to estates in possession. This part of the rule is, in fact, a mere enunciation of the proposition already explained, that when the ancestor, by any gift or conveyance, takes an estate for life, and in the same gift or conveyance, an estate is immediately limited to his heirs in fee or in tail, the words “the heirs” are words of limitation of the estate of the ancestor. Suppose, however, that it should anciently have been wished to interpose between the enjoyment of the lands by the ancestor and the enjoyment by the heir, the possession of some other party for some limited estate, as for his own life. Thus, let the estate have been given to A. and his heirs, but with a vested estate to B. for his own life, to take effect in possession next after the decease of A.,—thus suspending the enjoyment of the lands by the heir of A., until after the determination of the life estate of B. In such a case it

Rule in *Shelley's case*, as to estates in possession.

As to estates in remainder.

(c) Ante, p. 61.

is evident that B. would have had a vested estate for his life, in remainder, expectant on the decease of A.; and the manner in which such remainder would have been limited, would, as we have seen (*f*), have been to A. for his life, and after his decease to B. for his life. The only question then remaining would be as to the mode of expressing the rest of the intention,—namely, that, subject to B.'s life estate, A. should have an estate in fee simple. To this case the same reasoning applies, as we have already made use of in the case of an estate to A. for his life, and after his decease to his heirs. For an estate in fee simple is an estate, by its very terms, to a man and his heirs. But, in the present case, A. would have already had *his* estate given him by the first limitation to himself for his life; nothing, therefore, would remain but to give the estate to his heirs, in order to complete the fee simple. The last remainder would, therefore, be to the heirs of A.; and the limitations would run thus: "To A. for his life; and after his decease to B. for his life, and after his decease to the heirs of A." The heir, in this case, would not have taken any estate independently of his ancestor, any more than in the common limitation to A. and his heirs: the heir would have claimed the estate only by its descent from his ancestor, who had previously enjoyed it during his life; and the interposition of the estate of B. would have merely postponed that enjoyment by the heir, which would otherwise have been immediate. But we have seen that the very circumstance of a man's having an estate which is to go to his heir will now give him a power of alienation either by deed or will, and enable him altogether to defeat his heir's expectations. And, in a case like the present, the same privilege will now be enjoyed by A.; for, whilst he cannot by any means defeat the vested

(*f*) Ante, p. 301.

remainder belonging to B. for his life, he may, subject to B.'s life interest, dispose of the whole fee simple at his own discretion. A. therefore will now have in these lands, so long as B. lives, two estates, one in possession and the other in remainder. In possession A. has, with regard to B., an estate only for his own life. In remainder, expectant on the decease of B., he has, in consequence of his life interest being followed by a limitation to his heirs, a complete estate in fee simple. The right of B. to the possession, after A.'s decease, is the only thing which keeps the estate apart, and divides it, as it were, in two. If, therefore, B. should die during A.'s life, A. will be tenant for his own life, with an immediate remainder to his heirs; in other words, he will be tenant to himself and his heirs, and will enjoy, without any interruption, all the privileges belonging to a tenant in fee simple.

By parity of reasoning a similar result would follow, if the remainder were to the heirs of the body of A., or for an estate in tail, instead of an estate in fee simple. The limitation to the heirs of the body of A. would coalesce, as it is said, with his life estate, and give him an estate tail in remainder, expectant on the decease of B.; and if B. were to die during his lifetime, A. would become a complete tenant in tail in possession.

Remainder to
the heirs of

The example we have chosen, of an intermediate estate to B. for life, is founded on a principle evidently applicable to any number of intermediate estates, interposed between the enjoyment of the ancestor and that of his heir. Nor is it at all necessary that all these estates should be for life only; for some of them may be larger estates, as estates in tail. For instance, suppose lands given to A. for his life, and after his decease to B. and the heirs of his body, and in default of such issue (which is the method of expressing a

Any number
of estates may
interpose.

Intermediate
estate tail.

Example.

remainder after an estate tail), to the heirs of A. In this case A. will have an estate for life in possession, with an estate in fee simple in remainder, expectant on the determination of B.'s estate tail. An important case of this kind arose in the reign of Edward III. (*g*). Lands were given to one John de Sutton for his life, the remainder, after his decease, to John his son, and Eline, the wife of John the son, and the heirs of their bodies; and in default of such issue, to the right heirs of John the father. John the father died first; then, John and Eline entered into possession. John the son then died, and afterwards Eline his wife, without leaving any heir of her body. R., another son, and heir at law of John de Sutton, the father, then entered. And it was decided by all the justices that he was liable to pay a *relief* (*h*) to the chief lord of the fee, on account of the descent of the lands to himself from John the father. Thorpe, who seems to have been a judge, thus explained the reason of the decision:—"You are in as heir to your father, and your brother [father?] had the freehold before; at which time, if John his son and Eline had died [without issue] in his lifetime, he would have been tenant in fee simple."

Where the first estate is an estate tail.

The same principles will apply where the first estate is an estate in tail, instead of an estate for life. Thus, suppose lands to be given to A. and the heirs male of his body begotten, and in default of such issue, to the heirs female of his body begotten (*i*). Here, in default of male heirs of the body of A., the heirs female will inherit from their ancestor the estate in tail female, which by the gift had vested in him. There is no need to repeat the estate which the ancestor enjoys for his life, and to limit the lands, in default of heirs male, to

(*g*) *Provost of Beverley's case*,
Year Book, 40 Edw. III. 9. See
1 Prest. Estates, 304.

See ante, pp. 149, 152, 154.
(*i*) Litt. s. 719; Co. Litt. 376 b.

him and to the heirs female of his body begotten. This part of his estate in tail female has been already given to him in limiting the estate in tail male. The heirs female, being mentioned in the gift, will be supposed to take the lands as heirs, that is, by descent from their ancestor, in whom an estate in tail female must consequently be vested in his lifetime. For, the same rule, founded on the same principle, will apply in every instance; and this rule is no other than the rule in *Shelley's case*, which lays it down for law, that when the ancestor, by any gift or conveyance, takes an estate of freehold, and, in the same gift or conveyance, an estate is limited, *either mediately or immediately*, to his heirs in fee or in tail, the words "the heirs" are words of limitation of the estate of the ancestor. The heir, if he should take any interest, must take as heir by descent from his ancestor; for he is not constituted, by the words of the gift or conveyance, a *purchaser* of any separate and independent estate for himself.

Rule in *Shelley's case*.

The rule, it will be observed, requires that an estate of freehold merely should be taken by the ancestor, and not necessarily an estate for the whole of his own life or in tail. In the examples we have given, the ancestor has had an estate at least for his own life, and the enjoyment of the lands by other parties has postponed the enjoyment by his heirs. But the ancestor himself, as well as his heirs, may be deprived of possession for a time; and yet an estate in fee simple or fee tail may be effectually vested in the ancestor, subject to such deprivation. For instance, suppose lands to be given to A., a widow, during her life, provided she continue a widow and unmarried, and after her marriage, to B. and his heirs during her life, and after her decease, to her heirs. Here, A. has an estate in fee simple, subject to the remainder to B. for her life, ex-

Ancestor not have an estate for the whole of his life.

pectant on the event of her marrying again (*k*). For to apply to this case the same reasoning as to the former ones, A. has still an estate to her and to her heirs. She has the freehold or feudal possession, and, after her decease, her heirs are to have the same. It matters not to them that a stranger may take it for a while. The terms of the gift declare that what was once enjoyed by the ancestor shall afterwards be enjoyed by the heirs of such ancestor. These very terms then make an estate in fee simple, with all its incidental powers of alienation, controlled only by the rights of B. in respect of the estate conferred on him by the same gift.

Where the
takes
of
freehold.

But if the ancestor should take no estate of freehold under the gift, but the land should be granted only to his heirs, a very different effect would be produced. In such a case a most material part of the definition of an estate in fee simple would be wanting. For an estate in fee simple is an estate given to a man and his heirs, and not merely to the heirs of a man. The ancestor, to whose heirs the lands were granted, would accordingly take no estate or interest by reason of the gift to his heirs. But the gift, if it should ever take effect, would be a future contingent estate for the person who, at the ancestor's decease, should answer the description of heir to his freehold estates. The gift would accordingly fall within the class of future estates, of which an explanation is endeavoured to be given in the next chapter (*l*).

(*k*) *Curtis v. Price*, 12 Ves. 89.

(*l*) The most concise account of the rule in *Shelley's case*, together with the principal distinc-

tions which it involves, is that given by Mr. Watkins in his *Essay on the Law of Descents*, pp. 154 et seq. (194, 4th ed.).

CHAPTER II.

OF A CONTINGENT REMAINDER.

HITHERTO we have observed a very extensive power of alienation possessed by a tenant in fee simple. He might make an immediate grant, not of one estate merely, or two, but of as many as he might please, provided he ascertained the order in which his grantees were to take possession (*a*). This power of alienation, it will be observed, might in some degree render less easy the alienation of the land at a future time; for, it is plain that no sale could be made of an unincumbered estate in fee simple in the lands, unless every owner of each of these estates would concur in the sale, and convey his individual interest, whether he were the particular tenant, or the owner of any one of the estates in remainder (*b*). But if all these owners were to concur, a valid conveyance of an estate in fee simple could at any time be made. The exercise of the power of alienation, in the creation of vested remainders, did not, therefore, withdraw the land for a moment from that constant liability to complete alienation, which it has been the sound policy of modern law as much as possible to encourage. Vested re
land i
able.

But, great as is the power thus possessed, the law has granted to a tenant in fee simple, and to every other owner to the extent of his estate, a greater power still. For, it enables him, under certain restrictions, to grant estates to commence in interest, and not in possession merely, at a future time. So that during the period Future
estates.

(*a*) Ante, pp. 299, 300.(*b*) See ante, pp. 47--

Two kinds.

which may elapse before the commencement of such estates, the land may be withdrawn from its former liability to complete alienation, and be tied up for the benefit of those who may become the owners of such future estates. The power of alienation is thus allowed to be exercised in some degree to its own destruction. For, till such future estates come into existence, they may have no owners to convey them. Of these future estates there are two kinds, a contingent remainder, and an executory interest. The former is allowed to be created by any mode of conveyance. The latter can arise only by the instrumentality of a will; or of a *use* executed, or made into an estate by the Statute of Uses. The nature of an executory interest will be explained in the next chapter. The present will be devoted to contingent remainders, which, though abolished by the Act to simplify the transfer of property (*c*), were revived the next session by the Act to amend the law of real property (*d*), by which the former Act, so far as it abolished contingent remainders, was repealed as from the time of its taking effect.

Contingent remainders were anciently illegal.

The simplicity of the common law allowed of the creation of no other estates than particular estates, followed by the vested remainders, which have already occupied our attention. A contingent remainder—a remainder not vested, and which never might vest,—was long regarded as illegal. Down to the reign of Henry VI. not one instance is to be found of a contingent remainder being held valid (*e*). The early

(*c*) Stat. 7 & 8 Vict. c. 76, s. 8.

(*d*) Stat. 8 & 9 Vict. c. 106, s. 1.

(*e*) The reader should be informed that this assertion is grounded only on the author's researches. The general opinion appears to be in favour of the

antiquity of contingent remainders. See Third Report of Real Property Commissioners, p. 23; 1 Steph. Com. 615, n. (*c*), 8th ed. And an attempt to create a contingent remainder appears in an undated deed in Madox's *Formulare Anglicanum*, No. 635, p. 335.

authorities on the contrary are rather opposed to such a conclusion (*f*). And, at a later period, the authority of Littleton is express (*g*), that every remainder, which beginneth by a deed, must be *in* him to whom it is limited, before livery of seisin is made to him who is to have the immediate freehold. It appears, however, to have been adjudged, in the reign of Henry VI., that if land be given to a man for his life, with remainder to the right heirs of another *who is living*, and who afterwards dies, and then the tenant for life dies, the heir of the stranger shall have this land; and yet it was said

(*f*) Year Book, 11 Hen. IV. 74; in which case, a remainder to the right heirs of a man *who was dead before the remainder was limited*, was held to vest by purchase in the person who was heir. But it was said by Hankey, J., that if a gift were made to one for his life, with remainder to the right heirs of a man *who was living*, the remainder would be void, because the fee ought to pass immediately to him to whom it was limited. Note, also, that in *Manderille's case* (Co. Litt. 26 b), which is an ancient case of the heir of the body taking by purchase, the ancestor was *dead* at the time of the gift. The cases of rents are not apposite, as a diversity was long taken between a grant of a rent and a conveyance of the freehold. The decision in 7 Hen. IV. 6 b, cited in *Archer's case* (1 Rep. 66 b), was on a case of a rent-charge. The authority of P. 11 Rich. II. Fitz. Abr. tit. Detinue, 46, which is cited in *Archer's case* (1 Rep. 67 a), and in *Chudleigh's case* (1 Rep. 135 b), as well as in the margin of Co. Litt. 378 a, is merely a statement by the judge of

the opinion of the counsel against whom the decision was made. It runs as follows:—"Cherton to Rykhil—You think (*vous quides*) that inasmuch as A. S. was living at the time of the remainder being limited, that if he was dead at the time of the remainder falling in and had a right heir at the time of the remainder falling in, that the remainder would be good enough? Rykhil—Yes, Sir.—And afterwards in Trinity Term, judgment was given in favour of Wad [the opposite counsel]: *quod nota bene.*"

It is curious that so much pains should have been taken by modern lawyers to explain the reasons why a remainder to the heirs of a person who takes a prior estate of freehold, should not have been held to be a contingent remainder (see Fearn, Cont. Rem. 83 et seq.), when the construction adopted (subsequently called the rule in *Shelley's case*) was decided on before contingent remainders were allowed.

(*g*) Litt. s. 721; see also M. 27 Hen. VIII. 24 a.

Gift to A. for life with remainder to the right heirs of J. S.

that, at the time of the grant, the remainder was in a manner void (*h*). This decision ultimately prevailed. And the same case is accordingly put by Perkins, who lays it down, that if land be leased to A. for life, the remainder to the right heirs of J. S., who is alive at the time of the lease, this remainder is good, because there is one named in the lease (namely, A. the lessee for life), who may take immediately in the beginning of the lease (*i*). This appears to have been the first instance in which a contingent remainder was allowed. In this case J. S. takes no estate at all; A. has a life interest: and, so long as J. S. is living, the remainder in fee does not vest in any person under the gift; for, the maxim is *nemo est hæres viventis*, and J. S. being alive, there is no such person living as his heir. Here, accordingly, is a future estate, which will have no existence until the decease of J. S.; if, however, J. S. should die in the lifetime of A., and if he should leave an heir, such heir will then acquire a vested remainder in fee simple, expectant on A.'s life interest. But, until these contingencies happen or fail, the limitation to the right heirs of J. S. confers no present estate on any one, but merely give rise to the prospect of a future estate, and creates an interest of that kind which is known as a *contingent remainder* (*j*).

A gift to the heirs of a man confers a fee simple on his heir.

The gift to the *heirs* of J. S. has been determined to be sufficient to confer an estate in fee simple on the person who may be his heir, without any additional limitation to the heirs of such heir (*k*). If, however, the gift be made after the 31st of December, 1833, or by the will of a testator who shall have died after that day, the land will descend, on the decease of the heir

(*h*) Year Book, 9 Hen. VI. 24 a;
H. 32 Hen. VI. Fitz. Abr. tit.
Feoffments and Faits, 99.

(*i*) Perk. s. 52.

(*j*) 3 Rep. 20 a, in *Boraston's case*.

(*k*) 2 Jarman on Wills, 61, 62,
4th ed.

intestate, not to *his* heir, but to the next heir of J. S., in the same manner as if J. S. had been first entitled to the estate (*l*).

When contingent remainders began to be allowed, a question arose, which is yet scarcely settled, what becomes of the inheritance, in such a case as this, during the life of J. S.? A., the tenant for life, has but a life interest; J. S. has nothing, and his heir is not yet in existence. The ancient doctrine, that the remainder must vest at once or not at all, had been broken in upon; but the judges could not make up their minds also to infringe on the corresponding rule, that the fee simple must, on every feoffment which confers an estate in fee, at once depart out of the feoffor. They, therefore, sagely reconciled the rule which they left standing to the contingent remainders which they had determined to introduce, by affirming that, during the contingency, the inheritance was either in abeyance, or in *gremio legis* or else in *nubibus* (*m*). Modern lawyers, however, venture to assert, that what the grantor has not disposed of must remain in him, and cannot pass from him until there exists some grantee to receive it (*n*). And when the gift is by way of use under the Statute of Uses, there is no doubt that, until the contingency occurs, the use, and with it the inheritance, result to the grantor. So, in the case of a will, the inheritance, until the contingency happens, descends to the heir of the testator, unless disposed of by a residuary or specific devise (*o*).

What becomes
of the inheritance until
contingency
happens.

But whatever difficulties may have beset the departure

(*l*) Stat. 3 & 4 Will. IV. c. 106, s. 4.

(*m*) Co. Litt. 342 a; 1 P. Wms. 515, 516; Bac. Abr. tit. Remainder and Reversion (*c*).

(*n*) Fearn, Cont. Rem. 361. See, however, 2 Prest. Abst. 100

—107, where the old opinion is maintained.

(*o*) Fearn, Cont. Rem. 351; *Egerton v. Massey*, 3 C. B., N. S. 358; Williams on Settlements, 207—210.

In Lord Coke's time contingent remainders were well established.

The doctrine now settled.

Mr. Fearne's treatise.

from ancient rules, the necessities of society required that future estates, to vest in unborn or unascertained persons, should under certain circumstances be allowed. And, in the time of Lord Coke, the validity of a gift in remainder to become vested on some future contingency, was well established. Since his day the doctrine of contingent remainders has gradually become settled; so that, notwithstanding the uncertainty still remaining with regard to one or two points, the whole system now presents a beautiful specimen of an endless variety of complex cases, all reducible to a few plain and simple principles. To this desirable end the masterly treatise of Mr. Fearne on this subject (*p*) has mainly contributed.

Definition of a contingent remainder.

Let us now obtain an accurate notion of what a contingent remainder is, and, afterwards, consider the rules which are required to be observed in its creation.

We have already said that a contingent remainder is a future estate. As distinguished from an executory interest, to be hereafter spoken of, it is a future estate, which waits for and depends on the determination of the estates which precede it. But, as distinguished from a vested remainder, it is an estate in remainder, which is *not* ready, from its commencement to its end, to come into possession at any moment when the prior estates may happen to determine. For if any contingent remainder should, at any time, become thus ready to come into immediate possession, whenever the prior estates may determine, it will then be contingent no longer, but will at once become a vested remainder (*q*).

Example.

For example, suppose that a gift be made to A., a bachelor, for his life, and after the determination of

(*p*) Fearne's Essay on the Learning of Contingent Remainders and Executory Devises. The last edition of this work has been rendered valuable by an original

view of executory interests, contained in a second volume, appended by the learned editor, Mr. Josiah William Smith.

(*q*) See ante, p. 302.

that estate, by forfeiture or otherwise in his lifetime, to B. and his heirs during the life of A., and after the decease of A., to the eldest son of A. and the heirs of the body of such son. Here we have two remainders, one of which is vested, and the other contingent. The estate of B. is vested (*r*). Why? Because, though it be but a small estate, yet it is ready from the first, and so long as it lasts, continues ready to come into possession, whenever A.'s estate may happen to determine. There may be very little doubt but that A. will commit no forfeiture, but will hold the estate as long as he lives. But, if his estate should determine the moment after the grant, or at any time *whilst B.'s estate lasts*, there is B. quite ready to take possession. B.'s estate, therefore, is vested. But the estate tail to the eldest son of A. is plainly contingent. For A., being a bachelor, has no son; and, if he should die without one, the estate tail in remainder will *not* be ready to come into possession immediately on the determination of the particular estates of A. and B. Indeed, in this case, there will be no estate tail at all. But if A. should marry and have a son, the estate tail will at once become a vested remainder; for, so long as it lasts, that is, so long as the son or any of the son's issue may live, the estate tail is ready to come into immediate possession whenever the prior estates may determine, whether by A.'s death, or by B.'s forfeiture, supposing him to have got possession (*s*). It will be observed that here there is an estate, which, at the time of the grant, is future in interest, as well as in possession; and till the son is born, or rather till he comes of age, the lands are tied up, and placed beyond the power of complete alienation. This example of a contingent remainder is here given as by far the most usual, being that which occurs every day in the settlement of landed estates.

(*r*) Fearn, Cont. Rem. pp. 7 n, 325. (*s*) See ante, pp. 301, 302.

Two rules for
contingent remainder.

Rule 1.

noto-
riety of trans-
fer of the
feudal posses-
sion.

Example, a
feoffment to
A. to-day to
hold from to-
morrow.

To A. for life,
and after his
decease and
one day, to B.

The rules which are required for the creation of a contingent remainder may be reduced to two; of which the first and principal is well established; but the latter has occasioned a good deal of controversy. The first of these rules is, that the seisin, or feudal possession, must never be without an owner; and this rule is sometimes expressed as follows, that every contingent remainder of an estate of freehold must have a particular estate of freehold to support it (*t*). The ancient law regarded the feudal possession of lands as a matter the transfer of which ought to be notorious; and it accordingly forbad the conveyance of any estate of freehold by any other means than an immediate delivery of the seisin, accompanied by words, either written or openly spoken, by which the owner of the feudal possession might at any time thereafter be known to all the neighbourhood. If, on the occasion of any feoffment, such feudal possession was not at once parted with, it remained for ever with the grantor. Thus a feoffment, or any other conveyance of a freehold, made to-day to A., to hold from to-morrow, would be absolutely void, as involving a contradiction. For if A. is not to have the seisin till to-morrow, it must not be given him till then (*u*). So, if, on any conveyance, the feudal possession were given to accompany any estate or estates less than an estate in fee simple, the moment such estates, or the last of them, determined, such feudal possession would again revert to the grantor, in right of his old estate, and could not be again parted with by him, without a fresh conveyance of the freehold. Accordingly, suppose a feoffment to be made to A. for his life, and after his decease and one day, to B. and his heirs. Here, the moment that A.'s estate determines by his death, the feudal possession, which is not to belong to B. till one day afterwards, reverts

(*t*) 2 Bl. Com. 171.

(*u*) 2 Bl. Com. 166.

to the feoffor, and cannot be taken out of him without a new feoffment. The consequence is, that the gift of the future estate, intended to be made to B., is absolutely void. Had it been held good, the feudal possession would have been for one day without any owner; or, in other words, there would have been a so-called remainder of an estate of freehold, without a particular estate of freehold to support it. Let us now take the case we have before referred to, of an estate to A., a bachelor, for his life, and after his decease to his eldest son in tail. In this case it is evident, that the moment A.'s estate determines by his death, his son, if living, must necessarily be ready at once to take the feudal possession, in respect of his estate tail. The only case in which the feudal possession could, under such a limitation, ever be without an owner, at the time of A.'s decease, would be that of the mother being then *enccinte* of the son. In such a case the feudal possession would be evidently without an owner, until the birth of the son; and such posthumous son would accordingly lose his estate, were it not for a special provision which has been made in his favour. In the reign of William III. an Act of Parliament (r) was passed to enable posthumous children to take estates, as if born in their father's lifetime. And the law now considers every child *en ventre sa mère* as actually born, for the purpose of taking any benefit to which, if born, it would be entitled

To A. for his life, and after his decease to his eldest in tail.

Posthumous
as if born

As a corollary to the rule above laid down, arises another proposition, frequently itself laid down as a distinct rule, namely, that every contingent remainder must vest, or become an actual estate, during the con-

A contingent remainder during the particular estate, or *eo instanti* that it determines.

(r) Stat. 10 & 11 Will. III. c. 16. Beames, 367; *Mogg v. Mogg*, 1 Meriv. 654; *Trower v. Butts*, 1 Sim. & Stu. 181.
(x) *Doe v. Clarke*, 2 H. Bl. 399; *Blackburn v. Stables*, 2 Ves. &

Example.

tinuance of the particular estate which supports it, or *eo instanti* that such particular estate determines; otherwise such contingent remainder will fail altogether, and can never become an actual estate at all. Thus, suppose lands to be given to A. for his life, and after his decease to such son of A. as shall first attain the age of twenty-four years. As a contingent remainder the estate to the son is well created (*y*); for the feudal seisin is not necessarily left without an owner after A.'s decease. If, therefore, A. should, at his decease, have a son who should then be twenty-four years of age or more, such son will at once take the feudal possession by reason of the estate in remainder which vested in him the moment he attained that age. In this case the contingent remainder has vested during the continuance of the particular estate. But if there should be no son, or if the son should not have attained the prescribed age at his father's death, the remainder will fail altogether (*z*). For the feudal possession will then, immediately on the father's decease, revert, for want of another owner, to the person who made the gift in right of his reversion. And, having once reverted, it cannot now belong to the son, without the grant to him of some fresh estate by means of some other conveyance. An exception to this rule has now been made by the Act to amend the law as to contingent remainders (*a*). This Act provides that every contingent remainder created by any instrument executed after

Exception.

Cases in which
contingent
remainders
capable of
taking effect.

(*y*) 2 Prest. Abst. 148.

(*z*) *Festing v. Allen*, 12 Mees. & Wels. 279; 5 Hare, 573. See however as to this case, *Riley v. Garnett*, 3 Do Gex & S. 629; *Broune v. Broune*, 3 Sma. & Giff. 568, qy? *Re Mid Kent Railway Act*, 1856, *Ex parte Styau*, John. 387; *Holmes v. Prescott*, V.-C. W., 10 Jur., N. S. 507; 12 W. R. 636;

Rhodes v. Whithead, 2 Drew. & Sm. 532; *Price v. Hall*, L. R., 5 Eq. 399; *Perceval v. Perceval*, L. R., 9 Eq. 386; *Re Edde's Trust*, V.-C. B., L. R., 11 Eq. 559; *Brackenbury v. Gibbons*, 2 Ch. Div. 417; *Cunliffe v. Branker*, 3 Ch. Div. 393.

(*a*) Stat. 40 & 41 Vict. c. 33, passed 2nd August, 1877.

the passing of the Act, or by any will or codicil revived or republished by any will or codicil executed after that date, in tenements or hereditaments of any tenure, which would have been valid as a springing or shifting use or executory devise or other limitation, had it not had a sufficient estate to support it as a contingent remainder, shall, in the event of the particular estate determining before the contingent remainder vests, be capable of taking effect in all respects as if the contingent remainder had originally been created as a springing or shifting use or executory devise or other executory limitation. It will be found in the next chapter, which treats of an executory interest, that there are some future limitations, which are valid by way of springing or shifting use in a deed or executory devise in a will, without being preceded by any particular estate of freehold. This subject will accordingly be resumed in the next chapter.

A contingent remainder cannot be made to vest on any event which is illegal, or *contra bonos mores*. Accordingly no such remainder can be given to a child who may be hereafter born out of wedlock. But this can scarcely be said to be a rule for the creation of contingent remainders. It is rather a part of the general policy of the law in its discouragement of vice. In the reports of Lord Coke, however, a rule is laid down of which it may be useful to take some notice, namely, that the event on which a remainder is to depend must be a common possibility, and not a double possibility, or a possibility *on* a possibility, which the law will not allow (b). This rule, though professed to be founded on former precedents, is not to be found in any of the cases to which Lord Coke refers, in none of which do either of the expressions "possibility on a possibility,"

Events on which a contingent remainder may not vest.

Possibility on a possibility

(b) 2 Rep. 51 a ; 10 Rep. 50 b.

Scholastic
logic.

or “double possibility,” occur. It appears to owe its origin to the mischievous scholastic logic which was then rife in our Courts of law, and of which Lord Coke had so high an opinion that he deemed a knowledge of it necessary to a complete lawyer (c). The doctrine is indeed expressly introduced on the authority of logic:—“as the logician saith, ‘*potentia est duplex, remota et propinqua*’ ” (d). This logic, so soon afterwards demolished by Lord Bacon, appears to have left behind it many traces of its existence in our law; and perhaps it would be found that some of those artificial and technical rules which have most annoyed the judges of modern times (e) owe their origin to this antiquated system of endless distinctions without solid differences. To show how little of practical benefit could ever be derived from the distinction between a common and a double possibility, let us take one of Lord Coke’s examples of each. He tells us that the chance that a man and a woman, both married *to different persons*, shall themselves marry one another, is but a common possibility (f). But the chance that a married man shall have a son named Geoffrey is stated to be a double or remote possibility (g). Whereas it is evident that the latter event is at least quite as likely to happen as the former. And if the son were to get an estate from being named Geoffrey, as in the case put, there can be very little doubt but that Geoffrey would be the name given to the first son who might be born (h). Respect to the memory of Lord Coke has long kept on foot in our law books (i)

Examples of
common and
double
bilities.

(c) Preface to Co. Litt. p. 37.

(d) 2 Rep. 51 a.

(e) Such as the rule in *Dum-*
case, 4 Rep. 119.

(f) 10 Rep. 50 b; Year Book,
15 Hen. VII. 10 b, pl. 16.

(g) 2 Rep. 51 b.

(h) The true ground of the de-
cision in the old case (10 Edw. III.

45), to which Lord Coke refers,
was no doubt, as suggested by
Mr. Preston, 1 Prest. Abst. 128,
that the gift was made to Geoffrey
the son, as though he were living,
when in fact there was then no
such person.

(i) 2 Black. Com. 170; Fearne,
Cont. Rem. 252.

the rule that a possibility on a possibility is not allowed by law in the creation of contingent remainders. But the authority of this rule has long been declining (*j*), and a very learned judge, now deceased (*k*), declared plainly that it was abolished.

But although the doctrine of Lord Coke, that there can be no possibility on a possibility, has ceased to govern the creation of contingent remainders, there is yet a rule by which these remainders are restrained within due bounds, and prevented from keeping the lands, which are subject to them, for too long a period beyond the reach of alienation. This rule is the second Rule 2. rule, to which we have referred (*l*), and is as follows:— Gift to an unborn person for life, followed by any estate to any child of such unborn person (*m*); for in such a case the estate given to the child of the unborn person is void. This rule is apparently derived from the old doctrine which prohibited double possibilities. It may not be sufficient to restrain every kind of settlement which ingenuity might suggest; but it is directly opposed to the great motive which usually induces attempts at a perpetuity, namely, the desire of keeping an estate in the same family; and it has accordingly been hitherto found sufficient. An

der to his child, the remainder void.

(*j*) See Third Report of Real Property Commissioners, p. 29; 1 Prest. Abst. 128, 129.

(*k*) Lord St. Leonards, in *Cole v. Sewell*, 1 Conn. & Laws. 344; S. C. 4 Dru. & War. 1, 32. The decision in this case has been affirmed in the House of Lords, 2 H. of L. Cases, 186.

(*l*) Ante, p. 318.

(*m*) 2 Cases and Opinions, 432—441; *Hay v. Earl of Coventry*, 3 T. Rep. 86; *Brudenell v. Elwes*, 1 East, 452; *Fearne's Posthuma*,

215; *Fearne, Cont. Rem.* 502, 565, Butl. note; 2 Prest. Abst. 114; 1 Sugd. Pow. 470; 393, 8th ed.; 1 Jarin. Wills, 251, 252, 4th ed.; *Cole v. Sewell*, 2 H. of L. Cases, 186; *Monypenny v. Dering*, 2 De Gex, M. & G. 145, 170; Sugden on Property, 120; Sugden on the Real Property Statutes, p. 285, n. (*a*), 1st ed.; 274, n. (*a*), 2nd ed. See, however, per Wood, V.-C., in *Catlin v. Brown*, 11 Hare, 375, qy?

attempt has been made, with much ability, to explain away this rule as merely an instance of the rule by which, as we shall hereafter see, executory interests are restrained (*n*). But this rule is more stringent than that which confines executory interests; and if there were no other restraint on the creation of contingent remainders than the rule by which executory interests are confined, landed property might in many cases be tied up for at least a generation further than is now possible (*o*).

Gift by a will
of
person, after
a life estate to
such person.

The opinion which so generally prevails, that every man may make what disposition he pleases of his own estate,—an opinion countenanced by the loose description sometimes given by lawyers of an estate in fee simple (*p*),—has not unfrequently given rise to attempts made by testators to settle their property on future generations beyond the bounds allowed by law; thus lands have been given by will to the unborn son of some living person for his life, and after the decease of such unborn son, to *his* sons in tail. This last limitation to the sons of the unborn son in tail, we have observed, is void. The Courts of law, however, have been so indulgent to the ignorance of testators, that in the case of a will, they have endeavoured to carry the intention of the testator into effect, *as nearly as can possibly be done*, without infringing the rule of law; they, accordingly, take the liberty of altering his will to what they presume he would have done had he been acquainted with the rule which prohibits the son of any unborn son from being, in such circumstances, the

(*n*) See Lewis on Perpetuities, p. 408 et seq. The case of *Challis v. Doe d. Evers*, 18 Q. B. 231, must be admitted to accord with this opinion; but the point, though adverted to by the counsel for the appellant, was not taken by the

counsel for the respondent, nor mentioned in the judgment of the Court. This case has since been reversed in the House of Lords, 7 H. of L. Cas. 531.

(*o*) See Appendix (F).

(*p*) 2 Black. Com. 104.

object of a gift. This, in French law, is called the *cy près* doctrine (*q*). From what has already been said, it will be apparent that the utmost that can be legally accomplished towards securing an estate in a family is to give to the unborn sons of a living person estates in tail: such estates, if not barred, will descend on the next generation; but the risk of the entails being barred cannot, by any means, be prevented. The Courts, therefore, when they meet with such a disposition as above described, instead of confining the unborn son of the living person to the mere life estate given him by the terms of the will, and annulling the subsequent limitations to his offspring, give to such son an estate in tail, so as to afford to his issue a chance of inheriting should the entail remain unbarred. But this doctrine, being rather a stretch of judicial authority, is only applied where the estates given by the will to the children of the unborn child are estates in tail, and not where they are estates for life (*r*), or in fee simple (*s*). If, however, the estates be in tail, the rule equally applies, whether the estates tail be given to the sons successively according to seniority, or to all the children equally as tenants in common (*t*).

Though a contingent remainder is an estate which, if it arise, must arise at a future time, and will then belong to some future owner, yet the contingency may be of such a kind, that the future expectant owner may be now living. For instance, suppose that a conveyance

The owner of a contingent remainder may be now living.

Example.

(*q*) Fearn, Cont. Rem. 204, note; 1 Jarman on Wills, 298, 4th ed.; *Vanderplank v. King*, 3 Hare, 1; *Monypenny v. Dering*, 16 Mee. & Wels. 418; *Hampton v. Holman*, 5 Ch. Div. 183.

(*r*) *Seaward v. Willcock*, 5 East, 198. See, however, per Rolt, L. J., in *Forsbrook v. Forsbrook*, L.

R., 3 Ch. 93, 99; and per M. R., in *Hampton v. Holman*, 5 Ch. Div. 183, 193.

(*s*) *Bristow v. Warde*, 2 Ves. jun. 336; *Hale v. Perc*, 25 Beav. 335.

(*t*) *Pitt v. Jackson*, 2 Bro. C. C. 51; *Vanderplank v. King*, 3 Hare, 1.

be made to A. for his life, and if C. be living at his decease, then to B. and his heirs. Here is a contingent remainder, of which the future expectant owner, B., may be now living. The estate of B. is not a present vested estate, kept out of possession only by A.'s prior right thereto. But it is a future estate not to commence, either in possession or in interest, till A.'s decease. It is not such an estate as, according to our definition of a vested remainder, is always ready to come into possession whenever A.'s estate may end; for, if A. should die after C., B. or his heirs can take nothing. Still B., though he has no estate during A.'s life, has yet plainly a chance of obtaining one, in case C. should survive. This chance in law is called a *possibility*; and a possibility of this kind was long looked upon in much the same light as a condition of re-entry was regarded (*u*), having been inalienable at law, and not to be conveyed to another by deed of grant. A fine alone, before fines were abolished, could effectually have barred a contingent remainder (*x*). It might, however, have been released; that is to say, B. might, by deed of release, have given up his interest for the benefit of the reversioner, in the same manner as if the contingent remainder to him and his heirs had never been limited (*y*); for the law, whilst it tolerated conditions of re-entry and contingent remainders, always gladly permitted such rights to be got rid of by release, for the sake of preserving unimpaired such vested estates as might happen to be subsisting. A contingent remainder was also devisable by will under the old statutes (*z*), and is so under the present Act for the amendment of the laws

A possibility.
A contingent remainder could not be conveyed by deed,

but might be released.

Was devisable.

(*u*) Ante, p. 295.

(*x*) Fearne, Cont. Rem. 365; *Helps v. Hereford*, 2 Barn. & Ald. 242; *Doe d. Christmas v. Oliver*, 10 Barn. & Cress. 181; *Doe d. Lumley v. Earl of Scarborough*, 3

Adol. & Ell. 2.

(*y*) *Lampet's case*, 10 Rep. 48 a, b; *Marks v. Marks*, 1 Strange, 132.

(*z*) *Roe d. Perry v. Jones*, 1 H. Black. 30; Fearne, Cont. Rem. 366, note.

with respect to wills (*a*). And it was the rule in equity, <sup>Was assign-
able in equity.</sup> that an assignment intended to be made of a possibility for a valuable consideration should be decreed to be carried into effect (*b*). But the Act to amend the law <sup>Act to amend
the 1-1-12</sup> of real property (*c*) now enacts, that a contingent interest, and a possibility coupled with an interest, in any tenements or hereditaments of any tenure, whether the object of the gift or limitation of such interest or possibility be or be not ascertained, may be disposed of by deed. But every such disposition, if made by a married woman, was required to be made conformably to the provisions of the Act for the abolition of fines and recoveries (*d*).

The circumstance of a contingent remainder having been so long inalienable at law was a curious relict of the ancient feudal system. This system, the fountain <sup>Inalienable
nature of a
contingent
remainder.</sup> of our jurisprudence as to landed property, was strongly opposed to alienation. Its policy was to unite the lord and tenant by ties of mutual interest and affection; and nothing could so effectually defeat this end as a constant change in the parties sustaining that relation. The proper method, therefore, of explaining our laws, is not to set out with the notion that every subject of property may be aliened at pleasure; and then to endeavour to explain why certain kinds of property cannot be aliened, or can be aliened only in some modified manner. The law itself began in another way. When, and in what manner, different kinds of property gradually became subject to different modes of alienation is the matter to be explained; and this explanation we have endeavoured, in proceeding, as

(*a*) Stat. 7 Will. IV. & 1 Vict. c. 26, s. 3; *Ingilby v. Amcotts*, 21 Beav. 585. *Leighton*, 3 Meriv. 667, 668, note (*b*).
(*b*) *Fearne*, Cont. Rem. 550, 551; see, however, *Carleton v.*
(*c*) Stat. 8 & 9 Vict. c. 106, s. 6.
(*d*) See ante, pp. 279, 280.

far as possible to give. But, as to such interests as remained inalienable, the reason of their being so was, that they had not been altered, but remained as they were. The statute of *Quia emptores* (e) expressly permitted the alienation of lands and tenements,—an alienation which usage had already authorized; and ever since this statute, the ownership of an *estate* in lands (an estate tail excepted) has involved in it an undoubted power of conferring on another person the same, or, perhaps more strictly, a similar estate. But a contingent remainder is no estate—it is merely a chance of having one; and the reason why it so long remained inalienable at law was simply because it had never been thought worth while to make it alienable.

Destruction

Liability to
destruction
now removed.

Example.

One of the most remarkable incidents of a contingent remainder was its liability to destruction, by the sudden determination of the particular estate upon which it depended. This liability has now been removed by the Act to amend the law of real property (f): it was, in effect, no more than a strict application of the general rule, required to be observed in the creation of contingent remainders, that the freehold must never be left without an owner. For if, after the determination of the particular estate, the contingent remainder might still, at some future time, have become a vested estate, the freehold would, until such time, have remained undisposed of, contrary to the principles of the law before explained (g). Thus, suppose lands to have been given to A., a bachelor, for his life, and after his decease to his eldest son and the heirs of his body, and, in default of such issue, to B. and his heirs. In this case A. would have had a vested estate for his life in

) 18 Edw. I. c. 1, ante, p. 85. c. 76, s. 8, to the same effect.

(f) Stat. 8 & 9 Vict. c. 106, (g) Ante, p. 318.
s. 8, repealing stat. 7 & 8 Vict.

possession. There would have been a contingent remainder in tail to his eldest son, which would have become a vested estate tail in such son the moment he was born, or rather begotten; and B. would have had a vested estate in fee simple in remainder. Now suppose that, before A. had any son, the particular estate for life belonging to A., which supported the contingent remainder to his eldest son, should suddenly have determined during A.'s life, B.'s estate would then have become an estate in fee simple in possession. There must be some owner of the freehold; and B., being next entitled, would have taken possession. When his estate once became an estate in possession, the prior remainder to the eldest son of A. was for ever excluded. For, by the terms of the gift, if the estate of the eldest son was to come into possession at all, it must have come in before the estate of B. A forfeiture by A. of his life estate, before the birth of a son, would therefore at once have destroyed the contingent remainder by letting into possession the subsequent estate of B. (*h*).

Forfeiture of
life estate.

The determination of the estate of A. was, however, in order to effect the destruction of the contingent remainder, required to be such a determination as would put an end to his right to the freehold or feudal possession. Thus, if A. had been forcibly ejected from the lands, his right of entry would still have been sufficient to preserve the contingent remainder; and, if he should have died whilst so out of possession, the contingent remainder might still have taken effect. For, so long as A.'s feudal possession, or his right thereto, continues, so long, in the eye of the law, does his estate last (*i*).

A right of
entry would
have sup-
ported a
contingent re-
mainder.

... Fearne, Cont. Rem. 317; Bing. N. C. 609.
see *Doe d. Davics v. Gatacre*, 5 (1) Fearne, Cont. Rem. 286.

Merger.

It is a rule of law, that “whenever a greater estate and a less coincide and meet in one and the same person, without any intermediate estate, the less is immediately annihilated; or, in the law phrase, is said to be merged, that is, sunk or drowned in the greater” (*k*). From the operation of this rule, an estate tail is preserved by the effect of the statute *De donis* (*l*). Thus, the same person may have, at the same time, an estate tail, and also the immediate remainder or reversion in fee simple expectant on the determination of such estate tail by failure of his own issue. But with regard to other estates, the larger will swallow up the smaller; and the intervention of a contingent remainder which, while contingent, is not an estate, will not prevent the application of the rule. Accordingly, if in the case above given A. should have purchased B.’s remainder in fee, and should have obtained a conveyance of it to himself, before the birth of a son, the contingent remainder to his son would have been destroyed. For in such a case, A. would have had an estate for his own life, and also, by his purchase, an immediate vested estate in fee simple in remainder expectant on his own decease; there being, therefore, no vested estate intervening, a merger would have taken place of the life estate in the remainder in fee. The possession of the estate in fee simple would have been accelerated and would have immediately taken place, and thus a destruction would have been effected of the contingent remainder (*m*), which could never afterwards have become a vested estate; for, were it to have become vested, it must have taken possession subsequently to the remainder in fee simple; but this it could not do, both by the terms of the gift, and also by the very nature of a remainder in fee simple, which can never have a remainder after it. In the same manner

(*k*) 2 Black. Com. 177.

p. 65.

(*l*) Stat. 13 Edw. I. c. 1; ante,

(*m*) Fearne, Cont. Rem. 340.

the sale by A. to B. of the life estate of A., called in law a *surrender* of the life estate, before the birth of a son, would have accelerated the possession of the remainder in fee simple by giving to B. an uninterrupted estate in fee simple in possession; and the contingent remainder would consequently have been destroyed (*n*). The same effect would have been produced by A. and B. both conveying their estates to a third person, C., before the birth of a son of A. The only estates then existing in the land would have been the life estate of A. and the remainder in fee of B. C., therefore, by acquiring both these estates, would have obtained an estate in fee simple in possession; on which no remainder could depend (*o*). But now the Act to amend the law of real property (*p*) has altered the law in all these cases; for, whilst the principles of law on which they proceeded have not been expressly abolished, it is nevertheless enacted (*q*), that a contingent remainder shall be, and if created before the passing of the Act shall be deemed to have been, capable of taking effect notwithstanding the determination by forfeiture, surrender or merger of any preceding estate of freehold, in the same manner in all respects as if such determination had not happened. This Act, it will be observed, applies only to the three cases of forfeiture, surrender or merger of the particular estate. If, at the time when the particular estate would naturally have expired, the contingent remainder be not ready to come into immediate possession, it will still fail as before (*r*), except in the cases provided for by the recent Act to amend the law as to contingent remainders (*s*).

Surrender of
the life estate.

Act to amend
the law of real

(*n*) Fearne, Cont. Rem. 318.

s. 8, to the same effect.

(*o*) Fearne, Cont. Rem. 322,
note; *Noel v. Bewley*, 3 Sim. 103;
Egerton v. Massey, 3 C. B., N. S.
338.

(*q*) Sect. 8.

(*r*) *Price v. Hall*, L. R., 6 Eq.
399; *Perceval v. Perceval*, L. R.,
9 Eq. 386.

(*p*) Stat. 8 & 9 Vict. c. 106,
repealing stat. 7 & 8 Vict. c. 76,

(*s*) Stat. 40 & 41 Vict. c. 33,
ante, pp. 320, 321.

Trustees to
preserve con-
tingent re-
mainders.

The disastrous consequences which would have resulted from the destruction of the contingent remainder, in such a case as that we have just given, were obviated in practice by means of the interposition of a vested estate between the estates of A. and B. We have seen (*t*) that an estate for the life of A., to take effect in possession after the determination, by forfeiture or otherwise, of A.'s life interest, is not a contingent, but a vested estate in remainder. It is a present existing estate, always ready, so long as it lasts, to come into possession the moment the prior estate determines. The plan, therefore, adopted for the preservation of contingent remainders to the children of a tenant for life was to give an estate, after the determination by any means of the tenant's life interest, to certain persons and their heirs during his life, as trustees for preserving the contingent remainders; for which purpose they were to enter on the premises, should occasion require; but should such entry be necessary, they were nevertheless to permit the tenant for life to receive the rents and profits during the rest of his life. These trustees were prevented by the Court of Chancery from parting with their estate, or in any way aiding the destruction of the contingent remainders which their estate supported (*u*). And, so long as their estate continued, it is evident that there existed prior to the birth of any son, three vested estates in the land; namely, the estate of A. the tenant for life, the estate in remainder of the trustees during his life, and the estate in fee simple in remainder, belonging, in the case we have supposed, to B. and his heirs. This vested estate of the trustees, interposed between the estates of A. and B., prevented their union, and consequently prevented the remainder in fee simple from ever coming into possession, so long as the estate of the trustees

(*t*) Ante, pp. 316, 317.

(*u*) Fearn, Cont. Rem. 326.

endured, that is, if they were faithful to their trust, so long as A. lived. Provision was thus made for the keeping up of the feudal possession until a son was born to take it; and the destruction of the contingent remainder in his favour was accordingly prevented. But now that contingent remainders can no longer be destroyed, of course there is no occasion for trustees to preserve them.

The following extract from a modern settlement, of a date previous to the Act to amend the law of real property (*v*), will explain the plan which used to be adopted. The lands were conveyed to the trustees and their heirs, to the uses declared by the settlement; by which conveyance the trustees took no permanent estate at all, as has been explained in the Chapter on Uses and Trusts (*w*), but the seisin was at once transferred to those to whose use estates were limited. Some of these estates were as follows:—“To the use of the said A. To A. for life.
 “and his assigns for and during the term of his natural
 “life without impeachment of waste and from and im-
 “mediately after the determination of that estate by
 “forfeiture or otherwise in the lifetime of the said A.
 “To the use of the said (*trustees*) their heirs and assigns To trustees
 “during the life of the said A. In trust to preserve during his life
 “the contingent uses and estates hereinafter limited to preserve
 “from being defeated or destroyed and for that purpose remainders.
 “to make entries and bring actions as occasion may
 “require But nevertheless to permit the said A. and
 “his assigns to receive the rents issues and profits of
 “the said lands hereditaments and premises during his
 “life And from and immediately after the decease
 “of the said A. To the use of the first son of the To A.’s first
 “said A. and of the heirs of the body of such first son;
 “lawfully issuing and in default of such issue To the

(*v*) 8 & 9 Vict. c. 106.

(*w*) Ante, pp. 188, 189.

“ use of the second third fourth fifth and all and every
 “ other son and sons of the said A. severally succes-
 “ sively and in remainder one after another as they
 “ shall be in seniority of age and priority of birth and
 “ of the several and respective heirs of the body and
 “ bodies of all and every such son and sons lawfully
 “ issuing the elder of such sons and the heirs of his
 “ body issuing being always to be preferred to and to
 “ take before the younger of such sons and the heirs
 “ of his and their body and respective bodies issuing
 “ And in default of such issue” &c. Then follow the
 other remainders.

Trust estates.

In a former part of this volume we have spoken of equitable or trust estates (*x*). In these cases, the whole estate at law belongs to trustees, who are accountable in equity to their *cestuis que trust*, the beneficial owners. As equity follows the law in the limitation of its estates, so it permits an equitable or trust estate to be disposed of by way of particular estate and remainder, in the same manner as an estate at law. Contingent remainders may also be limited of trust estates. But between such contingent remainders, and contingent remainders of estates at law, there was always this difference, that whilst the latter were destructible, the former were not (*y*). The destruction of a contingent remainder of an estate at law depended, as we have seen, on the ancient feudal rule, which required a continuous and ascertained possession of every piece of land to be vested in some freeholder. But in the case of trust estates, the feudal possession remains with the trustee (*z*). And, as the destruction

Contingent
 remainders of
 estates
 were inde-
 structible.

(*x*) See the chapter on Uses and Trusts, ante, p. 193 et seq.

(*y*) Fearne, Cont. Rem. §21.

(*z*) See *Chapman v. Blissett*, Cas. temp. Talbot, 145, 151; *Hopkins*

v. Hopkins, Cas. temp. Talbot, 52 n.; *Astley v. Micklethwait*, 15 Ch. D. 59; *Abbies v. Burney*, 17 Ch. D. 211.

of contingent remainders at law defeated, when it happened, the intention of those who created them, equity did not so far follow the law as to introduce into its system a similar destruction of contingent remainders of trust estates. It rather compelled the trustees continually to observe the intention of those whose wishes they had undertaken to execute. Accordingly, if a conveyance had been made unto *and to the use of* A. and his heirs, in trust for B. for life, and after his decease in trust for his first and other sons successively in tail,—here the whole legal estate would have been vested in A., and no act that B. could have done, nor any event which might have happened to his equitable estate, before its natural termination, could have destroyed the contingent remainder directed to be held by A. or his heirs in trust for the eldest son.

It may be proper to mention in this place, that an Act has been passed for granting duties on succession to property on the death of any person dying after the 19th of May, 1853, the time appointed for the commencement of the Act (*a*). These duties are as follows:—Where the successor is the lineal issue or lineal ancestor of the predecessor, the duty is at the rate of one per cent. on the value of the succession (*b*); if a brother or sister, or a descendant of a brother or sister, three per cent.; if a brother or sister of the father or mother, or a descendant of such a brother or sister, five per cent.; if a brother or sister of the grandfather or grandmother of the predecessor, or a descendant of

The
Succession
Act,

(*a*) Stat. 16 & 17 Vict. c. 51; H. of L. Cas. 477; *Attorney-Gen. v. Smythe*, 9 H. of L. Cas. 498; *Charlton v. Attorney-Gen.*, 4 App. Cas. 427.
see *Wilcox v. Smith*, 4 Drew. 40; *Attorney-Gen. v. Lord Middleton*, 3 H. & N. 125; *Attorney-Gen. v. Sibthorpe*, 3 H. & N. 424; *Attorney-Gen. v. Lord Braybrooke*, 5 H. & N. 488; 9 H. of L. Cas. 150; *Attorney-Gen. v. Floyer*, 9

(*b*) See stat. 44 Vict. c. 12, s. 41; Williams on Personal Property, 476 (*Addenda*), 521, 537, 12th ed.

such a brother or sister, six per cent. ; and if the successor shall be in any other degree of collateral consanguinity to the predecessor, or shall be a stranger in blood to him, the duty is ten per cent. (c). Every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property or the income thereof upon the death of any person dying after the 19th of May, 1853, either immediately or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation, and every devolution by law of any beneficial interest in property, or the income thereof, upon the death of any person dying after that day, to any other person in possession or expectancy, is deemed to have conferred, or to confer, on the person entitled by reason of any such disposition or devolution “a succession ;” and the term “successor” denotes the person so entitled ; and the term “predecessor” denotes the settlor, testator, obligor, ancestor, or other person from whom the interest of the successor is or shall be derived (d). The interest, however, of a successor to real property is considered to be of the value of an annuity equal to the annual value (e) of such property during his life, or for any less period during which he may be entitled ; and every such annuity is to be valued, for the purposes of the Act, according to tables set forth in the schedule to the Act ; and the duty is to be paid by eight equal half-yearly instalments, the first to be paid at the end of twelve months after the successor shall have become entitled to the beneficial enjoyment of the property ; and the seven following instalments are to be paid at half-yearly intervals of six months each, to be computed from the day on which the first instalment shall have become

A succession.

The successor.

The predecessor.

(c) Stat. 16 & 17 Vict. c. 51, *Littledale*, L. R., 5 H. of L. 290.

s. 10. (e) *Attorney-Gen. v. Earl of*

(d) Sect. 2 ; *Attorney-Gen. v. Sefton*, 11 H. of L. Cas. 257.

due. But if the successor shall die before all such instalments shall have become due, then any instalments not due at his decease shall cease to be payable; except in the case of a successor who shall have been competent to dispose by will (*f*) of a continuing interest in such property, in which case the instalments unpaid at his death shall be a continuing charge on such interest in exoneration of his other property, and shall be payable by the owner for the time being of such interest (*g*).

(*f*) *Attorney-Gen. v. Hallett*, 2
H. & N. 368.

(*g*) Stat. 16 & 17 Vict. c. 51,
s. 21.

CHAPTER III.

OF AN EXECUTORY INTEREST.

Executory
interests arise
of their own
strength.

CONTINGENT remainders are future estates, which, as we have seen (*a*), were, until recently, continually liable, in law, until they actually existed *as estates*, to be destroyed altogether,—executory interests, on the other hand, are future estates, which in their nature are indestructible (*b*). They arise, when their time comes, as of their own inherent strength; they depend not for protection on any prior estates, but on the contrary, they themselves often put an end to any prior estates, which may be subsisting. Let us consider, first, the means by which these future estates may be created; and secondly, the time fixed by the law, within which they must arise, and beyond which they cannot be made to commence.

SECTION I.

Of the Means by which Executory Interests may be created.

1. Executory interests may now be created in two ways—under the Statute of Uses (*c*), and by will. Executory

(*a*) Ante, p. 328 et seq.

(*b*) Fearne, Cont. Rem. 418. Before fines were abolished, it was a matter of doubt whether a fine would not bar an executory interest, in case of non-claim for five years after a right of entry had arisen under the executory interest. *Romilly v. James*, 6

Taunt. 263; see ante, p. 71. Executory interests subsequent to, or in defeazance of an estate tail, may also be barred in the same manner, and by the same means, as remainders expectant on the determination of the estate tail. Fearne, Cont. Rem. 423. Stat. 27 Hen. VIII. c. 10.

interests created under the Statute of Uses are called *springing or shifting uses*. We have seen (*d*) that, previously to the passing of this statute, the use of land was under the sole jurisdiction of the Court of Chancery, as trusts were afterwards. In the exercise of this jurisdiction it would seem that the Court of Chancery, rather than disappoint the intentions of parties, gave validity to such interests of a future or executory nature, as were occasionally created in the disposition of the use (*e*). For instance, if a feoffment had been made to A. and his heirs, to the use of B. and his heirs from to-morrow, the Court would, it seems, have enforced the use in favour of B. notwithstanding that, by the rules of law, the estate of B. would have been void (*f*). Here we have an instance of an executory interest in the shape of a springing use, giving to B. a future estate arising on the morrow of its own strength, depending on no prior estate, and therefore not liable to be destroyed by its prop falling. When the Statute of Uses (*g*) was passed, the jurisdiction of the Court of Chancery over uses was at once annihilated. But uses in becoming, by virtue of the statute, estates at law, brought with them into the courts of law many of the attributes, which they had before possessed while subjects of the Court of Chancery. Amongst others which remained untouched, was this capability of being disposed of in such a way as to create executory interests. The legal seisin or possession of lands became then, for the first time, disposable without the observance of the formalities previously required (*h*); and, amongst the dispositions allowed, were these executory interests, in which the legal seisin is shifted about from one person to another,

and shift

uses anciently
allowed by
the Court of
Chancery.The Statute
of Uses.

Executory

(*d*) Ante, pp. 186, 187.(*g*) 27 Hen. VIII. c. 10, ante,(*e*) Butl. n. (*a*) to Fearne, Cont. p. 188.

Rem. 384.

(*h*) See ante, pp. 219, 220.(*f*) Ante, p. 318.

at the mercy of the springing uses, to which the seisin has been indissolubly united by the Act of Parliament: accordingly it now happens that by means of uses, the legal seisin or possession of lands may be shifted from one person to another in an endless variety of ways. We have seen (*i*), that a conveyance to B. and his heirs to hold from to-morrow, is absolutely void. But by means of shifting uses, the desired result may be accomplished; for, an estate may be conveyed to A. and his heirs, to the use of the conveying party and his heirs until to-morrow, and then to the use of B. and his heirs.

Example:—
To the use of
A. and his
heirs until a
marriage,
and, after the

o

A very common instance of such a shifting use occurs in an ordinary marriage settlement of lands. Supposing A. to be the settlor, the lands are then conveyed by him, by the settlement executed a day or two before the marriage, to the trustees (say B. and C. and their heirs) “to the use of A. and his heirs until the intended marriage shall be solemnized, and from and immediately after the solemnization thereof,” to the uses agreed on; for example, to the use of D., the intended husband, and his assigns for his life, and so on. Here B. and C. take no permanent estate at all, as we have already seen (*k*). A. continues, as he was, a tenant in fee simple until the marriage; and, if the marriage should never happen, his estate in fee simple will continue with him untouched. But, the moment the marriage takes place,—without any further thought or care of the parties,—the seisin or possession of the lands shifts away from A. to vest in D., the intended husband, for his life, according to the disposition made by the settlement. After the execution of the settlement, and until the marriage takes place, the interest of all the parties, except the settlor, is future, and contingent also on the event of the marriage. But the life estate of D., the intended husband, is not an interest of the kind called a contingent remainder. For,

(*i*) Ante, p. 318.

(*k*) Ante, pp. 189, 225.

the estate which precedes it, namely, that of A., is an estate in fee simple, after which no remainder can be limited. The use to D. for his life springs up on the marriage taking place, and puts an end at once and for ever to the estate in fee simple which belonged to A. Here, then, is the destruction of one estate, and the substitution of another. The possession of A. is wrested from him by the use to D., instead of D.'s estate waiting till A.'s possession is over, as it must have done had it been merely a remainder. Another instance of the application of a shifting use occurs in those cases in which it is wished that any person who shall become entitled under the settlement should take the name and arms of the settlor. In such a case, the intention of the settlor is enforced by means of a shifting clause, under which, if the party for the time being entitled should refuse or neglect, within a definite time, to assume the name and bear the arms, the lands will shift away from him, and vest in the person next entitled in remainder.

Another
instance.

Name and
arms.

From the above examples, an idea may be formed of the shifts and devices which can now be affected in settlements of land, by means of springing and shifting uses. By means of a use, a future estate may be made to spring up with certainty at a given time. It may be thought, therefore, that contingent remainders, having until recently been destructible, would never have been made use of in modern conveyancing, but that every thing would have been made to assume the shape of an executory interest. This, however, is not the case. For, in many instances, future estates are necessarily required to wait for the regular expiration of those which precede them; and, when this is the case, no act or device can prevent such estates from being what they are, contingent remainders. The only thing that could formerly be done, was to take care for their

No limitation construed as a shifting use which can be regarded as a remainder.

preservation, by means of trustees for that purpose. For, the law, having been acquainted with remainders long before uses were introduced into it, will never construe any limitation to be a springing or shifting use, which, by any fair interpretation, can be regarded as a remainder, whether vested or contingent (l).

The establishment of shifting and contingent uses occasioned great difficulties to the early lawyers, in consequence of the supposed necessity that there should, at the time of the happening of the contingency on which the use was to shift, be some person seised to the use then intended to take effect. If a conveyance were made to B. and his heirs, to the use of A. and his heirs until a marriage or other event, and afterwards to the use of C. and his heirs, it was said that the use was executed in A. and his heirs by the statute, and that as this use was co-extensive with the seisin of B., B. could have no actual seisin remaining in him. The event now happens. Who is seised to the use of C.? In answer to this question it was held that the original seisin reverts back to B., and that on the event happening he becomes seised to the use of C. And to support this doctrine it was further held that meantime

Scintilla juris. a possibility of seisin, or *scintilla juris*, remained vested in B. But this doctrine, though strenuously maintained in theory, was never attended to in practice. And in modern times the opinion contended for by Lord St. Leonards was generally adopted, that in fact no *scintilla* whatever remained in B., but that he was, by force of the statute, immediately divested of all estate, and that the uses thenceforward took effect as legal estates according to their limitations, by relation to the original seisin momentarily vested in B. (m).

(l) Fearne, Cont. Rem. 386—
395, 526; *Doe d. Harris v. Howell*,
10 Barn. & Cress. 191, 197; 1

Prest. Abst. 130. See *Re Lechmere and Lloyd*, 18 Ch. D. 524.
(m) Sugd. Pow. 19, 8th ed.

And a final blow to the doctrine has now been given The doctrine by an Act of Parliament (*n*), which provides that where by any instrument any hereditaments have been or shall be limited to uses, all uses thereunder, whether expressed or implied by law, and whether immediate or future, or contingent or executory, or to be declared under any power therein contained, shall take effect when and as they arise, by force of and by relation to the estate and seisin originally vested in the person seised to the uses; and the continued existence in him or elsewhere of any seisin to uses or scintilla juris shall not be deemed necessary for the support of, or to give effect to, future or contingent or executory uses; nor shall any such seisin to uses or scintilla juris be deemed to be suspended, or to remain or to subsist in him or elsewhere.

One of the most convenient and useful applications Powers. of springing uses occurs in the case of *powers*, which are methods of causing a use, with its accompanying estate, to spring up at the will of any given person (*o*):—Thus, lands may be conveyed to A. and his Example. heirs to such uses as B. shall, by any deed or by his will, appoint, and in default of and until any such appointment, to the use of C. and his heirs, or to any other uses. These uses will accordingly confer vested estates on C., or the parties having them, subject to be divested or destroyed at any time by B.'s exercising his *power* of appointment. Here B., though not owner of the property, has yet the power, at any time, at once to dispose of it, by executing a deed; and if he should please to appoint it to the use of himself and his heirs, he is at perfect liberty so to do; or, by virtue of his power, he may dispose of it by his will. This power of appointment is evidently a privilege of great value;

(*n*) Stat. 23 & 24 Vict. c. 38,
s. 7.

(*o*) See Co. Litt. 271 b, n. (1),
VII., 1.

Bankruptcy. and it is accordingly provided by the Bankruptcy Act, 1883, that the trustee for the creditors of any person becoming bankrupt may exercise, for the benefit of his creditors, all powers (except the right of nomination to a vacant ecclesiastical benefice) which might have been exercised by the bankrupt for his own benefit at the commencement of his bankruptcy or before his discharge (*p*). If, however, in the case above mentioned, B. should not become bankrupt, and should die without having made any appointment by deed or will, C.'s estate, having escaped destruction, will no longer be in danger. In such a case a liability was until recently incurred by the estate of C. in respect of the debts of B. secured by any judgment, decree, order, or rule of any court of law or equity. These judgment debts, by an Act of Parliament (*q*), to which reference has before been made (*r*), were made binding on all lands over which the debtor should, at the time of the judgment, or at any time afterwards, have any disposing power, which he might, without the assent of any other person, exercise for his own benefit. Before this Act was passed, nothing but an appointment by B. or his assignees, in exercise of his power, could have defeated or prejudiced the estate of C. And now, by the Act to which we have before referred for amending the law relating to future judgments (*s*), no judgment entered up after the 29th of July, 1864, the date of the Act, can affect any land of whatever tenure, until such land shall have been actually delivered in execution by virtue of a writ of *elegit*, or other lawful authority, in pursuance of such judgment.

**Judgment
debts.**

New Act.

(*p*) Stat. 46 & 47 Vict. c. 52, ss. 44, 56; see Williams on Personal Property, 224, 233, 240, 265, 270, 12th ed. Stat. 32 & 33 Vict. c. 71, ss. 15, par. (4), 25, par. (5), were to the same effect. The former Acts gave a similar power to the assignees of the

bankrupt; see stats. 6 Geo. IV. c. 16, s. 77; 12 & 13 Vict. c. 106, s. 147.

(*q*) Stat. 1 & 2 Vict. c. 110, ss. 11, 13.

(*r*) Ante, pp. 110, 111.

(*s*) Stat. 27 & 28 Vict. c. 112, ante, p. 112.

Suppose, however, that B. should exercise his power, and appoint the lands by deed, to the use of D. and his heirs. In this case, the execution by B. of the instrument required by the power, is the event on which the use is to spring up, and to destroy the estate already existing. The moment, therefore, that B. has duly executed his power of appointment over the use, in favour of D. and his heirs, D. has an estate in fee simple in possession vested in him, by virtue of the Statute of Uses, in respect of the *use* so appointed in his favour; and the previously existing estate of C. is thenceforth completely at an end. The power of dis-

Exercise of power by deed.

position exercised by B. extends, it will be observed, only to the use of the lands; and the fee simple is vested in the appointee, solely by virtue of the operation of the Statute of Uses, which always instantly annexes the legal estate to the use (*t*). If, therefore, B. were to make an appointment of the lands, in pursuance of his power to D. and his heirs, *to the use of E. and his heirs*, D. would still have the use, which is all that B. has to dispose of; and the use to E. would be a use upon a use, which, as we have seen (*u*), is not executed, or made into a legal estate, by the Statute of Uses. E., therefore, would obtain no estate at law: although the Court would, in accordance with the expressed intention, consider him beneficially entitled, and would treat him as the owner of an equitable estate in fee simple, obliging D. to hold his legal estate merely as a trustee for E. and his heirs.

The power is only over the use.

In the exercise of a power it is absolutely necessary that the terms of the power, and all the formalities required by it, should be strictly complied with. If the power should require a *deed* only, a *will* will not do; or, if a *will* only, then it cannot be exercised by a

The terms and formalities of the power must be complied with.

(*t*) See ante, pp. 189, 190.

(*u*) Ante, p. 191.

Power to be exercised by writing under hand and seal, attested by witnesses.

Stat. 54 Geo. III. c. 168.

deed (*v*), or by any other act, to take effect in the lifetime of the person exercising the power (*x*). So, if the power is to be exercised by a deed attested by *two* witnesses, then a deed attested by *one* witness only will be insufficient (*y*). This strict compliance with the terms of the power was carried to a great length by the Courts of law; so much so that where a power was required to be exercised by a writing *under hand and seal attested by witnesses*, the exercise of the power was held to be invalid if the witnesses did not sign a written attestation of the signature of the deed, as well as of the sealing (*z*). The decision of this point was rather a surprise upon the profession, who had been accustomed to attest deeds by an indorsement, in the words "sealed and delivered by the within-named B. in the presence of," instead of wording the attestation, as in such a case this decision required, "*Signed sealed and delivered*," &c. In order, therefore, to render valid the many deeds which by this decision were rendered nugatory, an Act of Parliament (*a*) was passed by which the defect thus arising was cured, as to all deeds and instruments, intended to exercise powers which were executed prior to the 30th of July, 1814, the day of the passing of the Act. But as the Act had no prospective operation, the words "*signed sealed and delivered*" were still necessary to be used in the attestation, in all cases where the power was to be exercised by writing *under hand and seal, attested by witnesses* (*b*). It is, however, now provided that

(*v*) *Majoribanks v. Drury*, 11.

(*x*) Sugd. Pow. 210, 8th ed.; 1 Chance on Powers, ch. 9, pp. 273 et seq.

(*y*) Sugd. Pow. 207 et seq., 8th ed.; 1 Chance on Powers, 331.

(*z*) *Wright v. Wakeford*, 4 Taunt. 213; *Doe d. Mansfield v. Peach*,

2 Mau. & Selw. 576; *Wright v. Barlow*, 3 Mau. & Selw. 512.

(*a*) 54 Geo. III. c. 168.

(*b*) See, however, *Vincent v. Bishop of Sodor and Man*, 5 Ex. Rep. 682, 693, in which case the Court of Exchequer intimated that they considered the case of *Wright v. Wakeford* now overruled

a deed executed after the 13th of August, 1859, in the New enact-
 presence of and attested by two or more witnesses in
 the manner in which deeds are ordinarily executed
 and attested, shall, so far as respects the execution and
 attestation thereof, be a valid execution of a power of
 appointment by deed or by any instrument in writing
 not testamentary; notwithstanding it shall have been
 expressly required that a deed or instrument in writing
 made in exercise of such power should be executed or
 attested with some additional or other form of execu-
 tion or attestation, or solemnity. Provided always,
 that this provision shall not operate to defeat any direc-
 tion in the instrument creating the power that the
 consent of any particular person shall be necessary to a
 valid execution, or that any act shall be performed, in
 order to give validity to any appointment having no
 relation to the mode of executing and attesting the
 instrument; and nothing contained in the Act is to pre-
 vent the donee of a power from executing it conformably
 to the power by writing, or otherwise than by an instru-
 ment executed and attested as an ordinary deed; and
 to any such execution of a power this provision is not
 to extend (c).

This strict construction adopted by the Courts of law, in the case of instruments exercising powers, is in some degree counterbalanced by the practice which prevailed in the Court of Chancery to give relief in certain cases, when a power had been defectively exercised,—a relief still afforded by the High Court of Justice, now that the Court of Chancery has been abolished. If the Courts of law have gone to the very limit of strictness,

Equitable relief on the execution of powers.

by the case of *Burdett v. Doe* d. *Newton v. Ricketts*, 9 H. of L.
Spilsbury, 10 Clark & Fin. 340; Cas. 262.
 6 Man. & Gran. 386. See also (c) Stat. 22 & 23 Vict. c. 35,
Re Rickett's Trusts, 1 John. & H. s. 12.
 70, 72, affirmed in H. of L. as

for the benefit of the persons entitled in default of appointment, the Court of Chancery, on the other hand, appears to have overstepped the proper boundaries of its jurisdiction in favour of the appointee (*d*). For, if the intended appointee be a purchaser from the person intending to exercise the power, or a creditor of such person, or his wife, or his child, or if the appointment be for a charitable purpose,—in any of these cases, equity will aid the defective execution of the power (*e*); in other words, the Court will compel the person in possession of the estate, and who was to hold it until the power was duly exercised, to give it up on an undue execution of such power. It is certainly hard that, for want of a little caution, a purchaser should lose his purchase or a creditor his security, or that a wife or child should be unprovided for; but it may well be doubted whether it be truly equitable, for their sakes, to deprive the person in possession; for the lands were originally given to him to hold until the happening of an event (the execution of the power), which, if the power be *not* duly executed, has in fact never taken place.

Exercise of
power by will.

The above remarks equally apply to the exercise of a power by will. Formerly, every execution of a power to appoint by will was obliged to be effected by a will conformed, in the number of its witnesses and other circumstances of its execution, to the requisitions of the power. But the Act for the amendment of the laws with respect to wills (*f*) requires that all wills should be executed and attested in the same uniform way (*g*); and it accordingly enacts (*h*), that no appointment made by will in exercise of any power shall be valid, unless the same be executed in the manner required by

Wills Act.

(*d*) See 7 Ves. 506; Sugd. Pow. 532 et seq., 8th ed. 5 Beav. 249.

(*e*) Sugd. Pow. 534, 535, 8th ed.; 2 Chance on Powers, c. 23, p. 488 et seq.; *Lucena v. Lucena*,

(*f*) 7 Will. IV. & 1 Vict. c. 26.

(*g*) See ante, p. 246.

(*h*) Sect. 10.

the Act: and that every will executed in the manner thereby required shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity.

These powers of appointment, viewed in regard to the individuals who are to exercise them, are a species of dominion over property, quite distinct from that free right of alienation which has now become inseparably annexed to every estate, except an estate tail, to which a modified right of alienation only belongs. As alienation by means of powers of appointment was of a less ancient date than the right of alienation annexed to ownership, so it was free from some of the incumbrances by which that right was clogged. Thus a man might exercise a power of appointment in favour of himself or of his wife (*i*); although, as we have seen (*k*), a man cannot, by virtue of his ownership, directly convey to himself, and could not, previously to the 1st January, 1882, so convey to his wife. So we have seen (*l*) that a married woman could not formerly convey her estates without a *fine*, levied by her husband and herself, in which she was separately examined; and afterwards, no conveyance of her estates could be made without a deed, in which her husband must have concurred, and which must have been separately acknowledged by her to be her own act and deed. But a power of appointment either by deed or will might be given to any woman; and, whether given to her when married or when single, she might exercise such a power without the consent of any husband to whom she might then or thereafter be married (*m*); and the power might be

Powers of alienation unconnected with ship difference in respect of ownership.

Appointments

Married woman exercise powers.

(i) Sugd. Pow. 471, 8th ed.

(k) Ante, pp. 225, 273.

(l) Ante, pp. 278, 279.

(m) *Doe d. Blomfield v. Eyre*, 3

C. B. 577; 5 C. B. 713.

Infants' marriage settlements.

exercised in favour of her husband, or of any one else (*n*). The Act of Parliament to which we have before referred (*o*), for enabling infants to make binding settlements on their marriage, with the sanction of the Court of Chancery, extends to property over which the infant has any power of appointment, unless it be expressly declared that the power shall not be exercised by an infant (*p*). But the Act provides, that in case any appointment under a power of appointment, or any disentailing assurance, shall have been executed by any *infant tenant in tail* under the Act, and such infant shall afterwards die under age, such appointment or disentailing assurance shall thereupon become absolutely void (*q*).

Ignorance of the nature of powers has caused disappointment of intention.

The power to dispose of property independently of any ownership, though established for some three centuries, is at the present day frequently unknown to those to whom such a power may belong. This ignorance has often given rise to difficulties and the disappointment of intention in consequence of the execution of powers by instruments of an informal nature, particularly by wills, too often drawn by the parties themselves. A testator would, in general terms, give all his estate or all his property; and because over some of it he had only a power of appointment, and not any actual ownership, his intention, till lately, was defeated. For such a general devise was no execution of his power of appointment, but operated only on the property that was his own. He ought to have given not only all that he had, but also all of which he had any power to dispose. The Act for the amendment of the laws with respect to wills (*r*) has now provided a remedy for such

(*n*) Sugd. Pow. 471, 8th ed.

7 Ch. D. 728.

(*o*) Ante, p. 89.

(*q*) Sect. 2.

(*p*) Stat. 18 & 19 Vict. c. 43,

(*r*) Stat. 7 Will. IV. & 1 Vict.

1. See *Re Cardross's Settlement*,

c. 26.

cases, by enacting (s) that a general devise of the real A
estate of a testator shall be construed to include any
real estate which he may have power to appoint in any
manner he may think proper (t), and shall operate as
an execution of such power, unless a contrary intention
shall appear by the will.

now
by a general
devise.

A power of appointment may sometimes belong to a A power may
person concurrently with the ordinary power of alien-
ation arising from the ownership of an estate in the
lands. Thus lands may be limited to such uses as A.
shall appoint, and in default of and until appointment
to the use of A. and his heirs (u). And in such a case
A. may dispose of the lands either by exercise of his
power (x), or by conveyance of his estate (y). If he
exercises his power the estate limited to him in default
of appointment is thenceforth defeated and destroyed;
and, on the other hand, if he conveys his estate, his A power may
power is thenceforward *extinguished*, and cannot be
exercised by him in derogation of his own conveyance.
So if, instead of conveying his whole estate, he should
convey only a partial interest, his power would be
suspended as to such interest, although in other respects
it would remain in force; that is, he may still exercise
his power, so only that he do not defeat his own grant.
When the same object may be accomplished either by
an exercise of the power, or by a conveyance of the
estate, care should be taken to express clearly by which
of the two methods the instrument employed is in-
tended to operate. Under such circumstances it is
very usual first to exercise the power, and afterwards

be extin-

suspended by
a conveyance
of the

(s) Sect. 27.

(t) *Cloves v. Audry*, 12 Beav.
604.

(u) *Sir Edward Clere's case*, 6
Rep. 17 b; *Maundrell v. Maun-*
drell, 10 Ves. 246.

(x) *Roach v. Wadham*, 6 East,
289.

(y) *Cox v. Chamberlain*, 4 Ves.
631; *Wynne v. Griffith*, 3 Bing.
179; 10 J. B. Moore, 592; 5 B.
& Cress. 923; 1 Russ. 283.

to convey the estate *by way of further assurance only*; in which case, if the power is valid and subsisting, the subsequent conveyance is of course inoperative (z); but if the power should by any means have been suspended or extinguished, then the conveyance takes effect.

The doctrine of powers, together with that of vested remainders, was brought into very frequent operation by the usual form of modern purchase deeds, whenever the purchaser was married on or before the first of January, 1834, or whenever, as sometimes happened, it was wished to render unnecessary any evidence that he was not so married. We have seen (a) that the dower of such women as were married on or before the first day of January, 1834, remained subject to the ancient law; and the inconvenience of taking the conveyance to the purchaser jointly with a trustee, for the purpose of barring dower, has also been pointed out (b). The modern method of effecting this object, and at the same time of conferring on the purchaser full power of disposition over the land, without the concurrence of any other person, was as follows: A general power of appointment by deed was in the first place given to the purchaser, by means of which he was enabled to dispose of the lands for any estate at any time during his life. In default of and until appointment, the land was then given to the purchaser for his life, and, after the determination of his life interest by any means in his lifetime, a remainder (which, as we have seen (c), was vested) was limited to a trustee and his heirs during the purchaser's life. This remainder was then followed by an ultimate remainder to the heirs and assigns of the purchaser for ever, or, which is the same thing, to the

Modern
method of
barring
dower.

(z) *Ray v. Pung*, 5 Mad. 310;
5 B. & Ald. 561; *Doe d. Wigan*
v. Jones, 10 B. & Cress. 459.

(a) *Ante*, p. 281.

(b) *Ante*, pp. 283, 284.

(c) *Ante*, pp. 316, 317.

purchaser, his heirs and assigns for ever (*d*). These limitations were sufficient to prevent the wife's right of dower from attaching. For the purchaser had not, at any time during his life, an estate of inheritance in possession, out of which estate only a wife could claim dower (*e*): he had during his life only a life interest, together with a remainder in fee simple expectant on his own decease. The intermediate vested estate of the trustee prevented, during the whole of the purchaser's lifetime, any union of this life estate and remainder (*f*). The limitation to the heirs of the purchaser gave him, according to the rule in Shelley's case (*g*), all the powers of disposition incident to ownership: though subject, as we have seen (*h*), to the estate intervening between the limitation to the purchaser and that to his heirs. But the estate in the trustee lasted only during the purchaser's life, and during his life might at any time be defeated by an exercise of his power. A form of these *uses to bar dower*, as they were called, will be found in the Appendix (*i*). As the estate of the husband under these uses is partly legal and partly equitable, the wife, if married after the 1st of January, 1834, will not be barred of her dower by these limitations (*k*); and if the deed is of a date previous to that day, even an express declaration contained in the deed that such was the intent of the uses will not be sufficient (*l*).

Besides these general powers of appointment, there exist also powers of a special kind. Thus the *estate* which is to arise on the exercise of the power of appointment may be of a certain limited duration and nature:

(*d*) Fearne, Cont. Rem. 347, n.;
Co. Litt. 379 b, n. (1).

(*e*) Ante, p. 283.

(*f*) Ante, p. 332.

(*g*) Ante, pp. 305, 309.

(*h*) Ante, p. 305.

(*i*) See Appendix (D).

(*k*) Ante, p. 286.

(*l*) *Fry v. Noble*, 20 Beav. 598;
7 De Gex, M. & G. 687; *Clarke*
v. Franklin, 4 K. & J. 266.

Where the
tion.

Power of
leasing.

of this an example occurs in the power of leasing which was formerly given to every tenant for life under a properly drawn settlement. We have seen (*m*) that before the year 1883, at the commencement of which the Settled Land Act, 1882, came into operation (*n*), a tenant for life by virtue of his ownership, had no power to make any disposition of the property to take effect after his decease. He could not, therefore, grant a lease for any certain term of years, but only contingently on his living so long; with this exception, that, if he claimed under a settlement made on or after the 1st of November, 1856, he might make a lease under the Settled Estates Act of 1856 or 1877 (*o*). But if his life estate were limited to him in the settlement by way of *use*, as in practice was always done, a power might be conferred on him of leasing the land for any term of years, and under whatever restrictions might be thought advisable. On the exercise of this power, a use would arise to the tenant for the term of years, and with it an estate for the term granted by the lease, quite independently of the continuance of the life of the tenant for life (*p*). But if the lease attempted to be granted should have exceeded the duration authorized by the power, or in any other respect infringed on the restrictions imposed, it would have been void altogether as an exercise of the power, and might, until the passing of the Act next mentioned, have been set aside by any person having the remainder or reversion, on the decease of the tenant for life. But an Act of Parliament of the present reign (*q*) now provides, that such a lease, if made *bonâ fide*, and if the lessee have entered thereunder, shall be considered in equity as a contract for a grant, at the request of the lessee, of a

Relief
defects in
leases under
powers.

(*m*) Ante, pp. 33—38, 47—54.

(*n*) Stat. 45 & 46 Vict. c. 38,
s. 1.

(*o*) See ante, p. 34.

(*p*) 10 Ves. 256.

(*q*) Stat. 12 & 13 Vict. c. 26,
amended by stat. 13 & 14 Vict.
c. 17.

valid lease under the power, to the like purport and effect as such invalid lease, save so far as any variation may be necessary in order to comply with the terms of the power (*r*). But in case the reversioner is able and willing during the continuance of the lessee's possession to confirm the lease without variation (*s*), the lessee is bound to accept a confirmation accordingly; and such confirmation may be by memorandum or note in writing, signed by the persons confirming and accepting respectively, or some other persons by them respectively thereunto lawfully authorized (*t*). And the acceptance of rent by the reversioner will be deemed a confirmation of the lease as against him, if upon or before such acceptance any receipt, memorandum or note in writing, confirming such lease, is signed by the person accepting such rent, or some other person by him thereunto lawfully authorized (*u*). There is a further provision, that where a lease, granted in the intended exercise of any such power of leasing, is invalid by reason that, at the time of the granting thereof, the person granting the same could not lawfully grant such lease, but the estate of such person in the hereditaments comprised in such lease shall have continued after the time when such or the like lease might have been granted by him in the lawful exercise of such power, then and in every such case such lease shall take effect and be as valid as if the same had been granted at such last-mentioned time; and all the provisions of the Act shall apply to every such lease (*x*). This enactment is valuable in the case, which sometimes happens, of a

(*r*) As to the power of a tenant for life to make a lease for giving effect to such a contract, see ante, pp. 37, 38; Williams's Conveyancing Statutes, 309—311.

(*s*) As to the power of a tenant for life in reversion to confirm such leases, see ante, p. 37; Wil-

liams's Conveyancing Statutes, 309—311.

(*t*) Stat. 13 & 14 Vict. c. 17, s. 3.

(*u*) Sect. 2.

(*x*) Stat. 12 & 13 Vict. c. 26, s. 4.

power to grant leases in possession being attempted to be exercised by a lease to commence a few days after its date. If the lessor should live till the day appointed for the commencement of the lease, the lease, which before the Act would have been invalid, is rendered valid by this enactment. Express powers of leasing, to take effect by virtue of the Statute of Uses, may still be validly created: but in practice their employment is now largely superseded in consequence of the extensive powers of leasing conferred on tenants for life by the Settled Land Act, 1882 (*y*). The enactments mentioned above (*z*) apply in the case of an intended exercise of a statutory, as well as of an express, power of leasing.

Power of sale
and exchange.

Another instance of a special power occurs in the case of the power of sale and exchange, which, before the year 1883, was usually inserted in settlements of real estate (*a*). This power provided that it should be lawful for the trustees of the settlement, with the consent of the tenant for life in possession under the settlement, and sometimes also at their own discretion during the minority of the tenant in possession, to sell or exchange the settled lands, and for that purpose to revoke the uses of the settlement as to the lands sold or exchanged, and to appoint such other uses in their stead as might be necessary to effectuate the transaction proposed. But it was provided that the money to arise from any such sale, or which might be received for equality of exchange, should be laid out in the purchase of other lands; and that such lands, and also the lands which might be received in exchange, should be settled by the trustees to the then subsisting uses of the settlement. It was further provided that, until a proper purchase could be found, the money might be invested

(*y*) Ante, pp. 35—38; see Williams's Conveyancing Statutes, 301.

(*z*) Stats. 12 & 13 Vict. c. 26, ss. 2, 4; 13 & 14 Vict. c. 17.

(*a*) See ante, pp. 47, 48.

in the funds or on mortgage, and the income paid to the person who would have been entitled to the rents, if lands had been purchased and settled. The object of this power was to keep up the settlement, and at the same time to facilitate the acquisition of lands which for any reason might be more desirable, in lieu of any of the settled lands which it might be expedient to part with. The direction to lay out the money in the purchase of other lands made the money, even before it was laid out, real estate in the contemplation of equity (*b*); and though no land should ever have been purchased, the parties entitled under the settlement would have taken in equity precisely the same estates in the investments of the money, as they would have taken in any lands which might have been purchased therewith. The power given to the trustees to revoke the uses of the settlement and appoint new uses, enabled them, by virtue of the Statute of Uses, to give the purchaser of the settled property a valid estate in fee simple, provided only that the requisitions of the power were complied with. And an enactment of the year 1859, enabled the Court to relieve a bonâ fide purchaser under such a power, in case the tenant for life, or any other party to the transaction, should by mistake have been allowed to receive for his own benefit a portion of the purchase-money, as the value of the timber or other articles (*c*). Previously to this statute, the Courts of Equity had not considered themselves authorized to give relief in such a case (*d*). A statute known as “Lord Cranworth’s Act” (*e*), embodied in settlements made after the passing of the Act the usual provisions, whenever it was expressly declared therein that trustees or

Relief
mistake
purchaser

Lord Cran-
worth’s Act.

(*b*) Ante, p. 197; see also Williams on Personal Property, 455, 456, 476, 477, 12th ed.

(*c*) Stat. 22 & 23 Vict. c. 35, s. 13.

(*d*) *Cockerell v. Cholmeley*, 1 Russ. & M. 418.

(*e*) Stat. 23 & 24 Vict. c. 145, passed 28th Aug. 1860; see ss. 1—10, 32, 34.

OF INCORPOREAL HEREDITAMENTS.

other persons therein named or indicated should have a power of sale either generally or in any particular event, or a power of exchange. But in practice, reliance was not very often placed on these provisions of the Act, which are now repealed (*f*). Since the commencement of the year 1883, the employment in settlements of express powers of sale and exchange has been rendered unnecessary, in consequence of the powers of sale and exchange given to tenants for life by the Settled Land Act, 1882 (*g*). And in drawing a settlement of land, it is now generally the practice to omit express powers of sale and exchange, as well as of leasing (*h*).

It was decided that the ordinary power of sale and exchange contained in settlements did not authorize the trustees to sell the lands with a reservation of the minerals (*i*). In consequence of this decision, which took the profession rather by surprise, an Act was passed (*k*) which confirmed all sales, exchanges, partitions and enfranchisements theretofore made, in intended exercise of any trust or power, of land with an exception or reservation of minerals, or of the minerals separately from the residue of the land (*l*). And it was provided that for the future every trustee and other person authorized to dispose of land by way of sale, exchange, partition or enfranchisement, might, with the sanction of the Court of Chancery, now represented by the Chancery Division of the High Court, to be obtained on petition in a summary way, dispose of the land without the minerals, or of the minerals without the land, unless forbidden so to do by the instrument creating the trust or power (*m*). A sale, exchange,

(*f*) By stat. 45 & 46 Vict. c. 38, s. 64.

(*g*) Ante, pp. 49—54.

(*h*) See Williams's Conveyancing Statutes, 297, 515, 517; ante, p. 356.

(*i*) *Buckley v. Howell*, 29 Beav. 546.

(*k*) Stat. 25 & 26 Vict. c. 108.

(*l*) Sect. 1.

(*m*) Stat. 25 & 26 Vict. c. 108, s. 2.

partition or mining lease may be made, under the powers conferred by the Settled Land Act, 1882 (*n*), either of land, with or without an exception or reservation of all or any of the mines and minerals therein, or of any mines and minerals, and in any such case with or without a grant or reservation of powers and privileges connected with mining purposes in relation to the settled land, or any part thereof, or any other land (*o*).

Other kinds of special powers occur where the *persons* who are to take estates under the powers are limited to a certain class. Powers to jointure a wife, and to appoint estates amongst children, are the most usual powers of this nature. When powers are thus given in favour of particular objects, the estates which arise from the exercise of the power take effect precisely as if such estates had been inserted in the settlement by which the power was given. Each estate, as it arises under the power, takes its place in the settlement in the same manner as it would have done had it been originally limited to the appointee, without the intervention of any power; and, if it would have been invalid in the original settlement, it will be equally invalid as the offspring of the power (*p*).

When the

The estates under the power take effect as if they had been inserted in the settlement.

It is provided, by the Succession Duty Act, 1853, that where any person shall have a general power of appointment, under any disposition of property taking effect upon the death of any person, he shall, in the event of his making any appointment thereunder, be

The Succession Duty Act, 1853.

(*n*) Stat. 45 & 46 Vict. c. 38; see ante, pp. 35—38, 49—54, 356, 358.

(*o*) Sect. 17, subs. 1. By subs. 2, an exchange or partition may be made subject to and in con-

sideration of the reservation of an undivided share in mines or minerals.

(*p*) Co. Litt. 271 b, n. (1), VII., 2.

deemed to be entitled, at the time of his exercising such power, to the property thereby appointed, as a succession derived from the donor of the power; and where any person shall have a limited power of appointment, under a disposition taking effect upon any such death, any person taking any property by the exercise of such power shall be deemed to take the same as a succession derived from the person creating the power as predecessor (*q*). But where the donee of a general power of appointment shall become chargeable with duty in respect of the property appointed by him under such power, he shall be allowed to deduct from the duty so payable any duty he may have already paid in respect of any limited interest taken by him in such property (*r*).

Powers may
be extin-
guished by
release.

Exceptions.

Release of

Powers may, generally speaking, be destroyed or extinguished by deed of release made by the donee or owner of the power to any person having any estate of freehold in the land; "for it would be strange and unreasonable that a thing, which is created by the act of the parties, should not by their act, with their mutual consent be dissolved again" (*s*). And it is now expressly enacted that a person to whom any power, whether coupled with an interest or not, is given may by deed release or contract not to exercise the power (*t*). The exceptions to this rule appear to be all reducible to the simple principle, that if the duty of the donee of the power may require him to exercise it at any future time, then he cannot extinguish it by release (*u*). By the Act for the

(*q*) Stat. 16 & 17 Vict. c. 51, s. 4. See *Re Barker*, Exch., 7 Jur., N. S. 1061; *Attorney-General v. Floyer*, H. of Lords, 9 Jur., N. S. 1; 9 H. of L. Cas. 477; *Charlton v. Attorney-General*, 4 App. Cas. 427.

(*r*) Sect. 33.

(*s*) *Albany's case*, 1 Rep. 110 b, 113 a; *Smith v. Death*, 5 Mad. 371; *Horner v. Swann*, Turn. & Russ. 430.

(*t*) Stat. 44 & 45 Vict. c. 41, s. 52. See Williams's *Conveyancing Statutes*, 226.

(*u*) See 2 Chance on Powers,

abolition of fines and recoveries (*x*), it is provided (*y*), powers by that every married woman may, with the concurrence of her husband, by deed to be acknowledged by her as her act and deed according to the provisions of the Act (*z*), release or extinguish any power which may be vested in or limited or reserved to her, in regard to any lands of any tenure, or any money subject to be invested in the purchase of lands (*a*), or in regard to any estate in any lands of any tenure, or in any such money as aforesaid, as fully and effectually as she could do if she were a feme sole (*b*). A power, whether coupled with an interest or not, may now be effectually disclaimed (*c*) by deed (*d*). The above remarks as to the extinguishment of powers are not intended to apply to statutory powers, which are regulated by the terms of the statute creating them. Thus, the powers given to a tenant for life by the Settled Land Act, 1882, are not capable of release; and a contract by a tenant for life not to exercise any of his powers under that Act is void (*e*). Our notice of powers must here conclude. On a subject so vast, much must necessarily remain unsaid. The masterly treatise of Sir Edward Sugden (afterwards Lord St. Leonards), and the accurate work of Mr. Chance on Powers, will supply the student with all the further information he may require.

Disclaimer of
a power.

2. An executory interest may also be created by will. Before the passing of the Statute of Uses (*f*),

Creation of
will.

584; Williams's Conveyancing Statutes, 227.

(*x*) Stat. 3 & 4 Will. IV. c. 74.

(*y*) Sect. 77.

(*z*) See ante, p. 279.

(*a*) See ante, p. 197.

(*b*) As to the capacity of married women to release or extinguish powers since the commencement of the Married Women's Property

Act, 1882, see Williams's Conveyancing Statutes, 383—386.

(*c*) See ante, p. 122.

(*d*) Stat. 45 & 46 Vict. c. 39, s. 6. See Williams's Conveyancing Statutes, 280, 281.

(*e*) Stat. 45 & 46 Vict. c. 38, s. 50.

(*f*) 27 Hen. VIII. c. 10.

Directions
that executors
should sell
lands devis-
able by cus-
tom.

wills were employed only in the devising of uses, under the protection of the Court of Chancery, except in some few cities and boroughs where the legal estate in lands might be devised by special custom (*g*). In giving effect to these customary devises, the Courts, in very early times, showed great indulgence to testators (*h*); and perhaps the first instance of the creation of an executory interest occurred in directions given by testators, that their executors should sell their tenements. Such directions were allowed by law in customary devises (*i*); and in such cases it is evident that the sale by the executors operated as the execution of a power to dispose of that in which they themselves had no kind of ownership. For executors, as such, have nothing to do with freeholds. Here, therefore, was a future estate or executory interest created; the fee simple was shifted away from the heir of the testator, to whom it had descended, and became vested in the purchaser, on the event of the sale of the tenement to him. The Court of Chancery also, in permitting the devise of the *use* of such lands as were not themselves devisable, allowed of the creation of executory interests by will, as well as in transactions between living persons (*k*). And in particular directions given by persons having others seised of lands to their use, that such lands should be sold by

Directions
that executors
should sell
lands of

(*g*) Ante, p. 245.

(*h*) 30 Ass. 183 a; Litt. sec. 586.

(*i*) Year Book, 9 Hen. VI. 24 b, Babington:—"La nature de devis ou terres sont devisables est, que on peut deviser que la terre sera vendu par executors, et ceo est bon, come est dit adevant, et est marveilous ley de raison: mes ceo est le nature d'un devis, et devise ad este use tout temps en tiel forme; et issint on aura loy- alment franktenement de cesty qui n'avoit rien, et en meme le

maniere come on aura fire from flint, et uncore nul fire est deins le flint: et ceo est pour performer le darrien volonte de le devisor." Paston.—"Une devis est marveilous en lui meme quand il peut prendre effect; car si on devise en Londres que ses executors vendront ses terres, et devie seisi; son heir est eins par descent, et encore par le vend des executors il sera onste." See also Litt. s. 169.

(*k*) Perk. ss. 507, 528.

their executors, were not only permitted by the Court ^{which others} of Chancery, but were also recognised by the legislature. For, by a statute of the reign of Henry VIII. (l), of a date previous to the Statute of Uses, it is provided, that in such cases, where part of the executors refuse to take the administration of the will, and the residue accept the charge of the same will, then all bargains and sales of the lands so willed to be sold by the executors, made by him or them only of the said executors that so doth accept the charge of the will, shall be as effectual as if all the residue of the executors so refusing, had joined with him or them in the making of the bargain and sale.

But, as we have seen (m), the passing of the Statute of Uses abolished for a time all wills of uses, until the Statute of Wills (n) restored them. When wills were restored, the uses, of which they had been accustomed to dispose, had been all turned into estates at law; and such estates then generally came, for the first time, within the operation of testamentary instruments. Under these circumstances, the courts of law, in interpreting wills, adopted the same lenient construction which had formerly been employed by themselves in the interpretation of customary devises, and also by the Court of Chancery in the construction of devises of the ancient use. The statute which, in the case of wills of *uses*, had given validity to sales made by the executors accepting the charge of the will, was extended, in its construction, to directions (now authorized to be made) for the sale by the executors of the *legal estate*, and also to cases where the legal estate was devised to the executors to be sold (o). Future estates at law were also allowed to be created by will,

The Statute
of Uses.

(l) Stat. 21 Hen. VIII. c. 4.

(m) Ante, p. 245.

(n) 32 Hen. VIII. c. 1.

(o) *Bonifant v. Greenfield*, Cro. Eliz. 80; Co. Litt. 113 a; see *Mackintosh v. Barber*, 1 Bing. 50.

Executory
devises.

Example.

and were invested with the same important attribute of indestructibility which belongs to all executory interests. These future estates were called *executory devises*, and in some respects they appear to have been more favourably interpreted than shifting uses contained in deeds (*p*), though, generally speaking, their attributes are the same. To take a common instance: a man may, by his will, devise lands to his son A., an infant, and his heirs; but in case A. should die under the age of twenty-one years, then to B. and his heirs. In this case A. has an estate in fee simple in possession, subject to an executory interest in favour of B. If A. should not die under age, his estate in fee simple will continue with him unimpaired. But if he should die under that age, nothing can prevent the estate of B. from immediately arising, and coming into possession, and displacing for ever the estate of A. and his heirs. Precisely the same effect might have been produced by a conveyance to uses. A conveyance to C. and his heirs, to the use of A. and his heirs, but in case A. should die under age, then to the use of B. and his heirs, would have effected the same result. Not so, however, a direct conveyance independently of the Statute of Uses. A conveyance directly to A. and his heirs would vest in him an estate in fee simple, after which no limitation could follow. In such a case, therefore, a direction that, if A. should die under age,

(*p*) In the cases of *Adams v. Savage* (2 Lord Raym. 855; 2 Salk. 679), and *Rawley v. Holland* (22 Vin. Abr. 189, pl. 11), limitations which would have been valid in a will by way of executory devise were held to be void in a deed by way of shifting or springing use. But these cases have been doubted by Mr. Serjeant Hill and Mr. Sanders (1 Sand. Uses,

142, 143; 148, 5th ed.), and denied to be law by Mr. Butler (note (*y*) to Fearn, Cont. Rem. p. 41). Mr. Preston also lays down a doctrine opposed to the above cases (1 Prest. Abst. 114, 130, 131). Sir Edward Sugden, however, supports these cases, and seems sufficiently to answer Mr. Butler's objection (Sugd. Gilb. Uses and Trusts, 35, note).

the land should belong to B. and his heirs, would fail to operate on the legal seisin; and the estate in fee simple of A. would, in case of his decease under age, still descend, without any interruption, to his heir at law.

A good illustration of the difference between a contingent remainder and an executory devise occurs in the case of a devise of lands by will to A. for life, with remainder in fee to such son of B. as shall first attain the age of twenty-one years. In this case the limitation to the son of B. is either a contingent remainder or an executory devise, according as A., the tenant for life, may or may not survive the testator. If A. should survive the testator, there will be an estate of freehold subsisting in the premises, for the determination of which the limitation to the son of B. must wait, before it can take effect in possession. This limitation is, therefore, a remainder; and, as it depends on the contingency of B. having a son who may attain twenty-one, it is a contingent remainder. But if A. should die in the lifetime of the testator, the will would start, on the testator's death, with a simple limitation to such son of B. as shall first attain the age of twenty-one years. This limitation has not to wait for the determination of any prior estate of freehold; but it arises of itself on the event of a son of B. attaining the age of twenty-one years; and it displaces, when it takes effect, the estate in fee simple, which, not being otherwise disposed of, descends, immediately on the death of the testator, to his heir at law. It is, therefore, in this case, not a contingent remainder, but an executory devise. Under the law as it stood before the passing of the Act to amend the law as to contingent remainders (*q*), if A. survived the testator, but died before

Difference
between a
contingent
remainder
and an exe-
cutory devise.

any son of B. attained twenty-one, the limitation failed for want of an estate of freehold to support it: whereas if A. died in the lifetime of the testator, it was not liable to any failure. It was to remedy the hardship occasioned by the failure of such a limitation as this, when it occurred in the shape of a contingent remainder, that the Act above mentioned was framed. And, as we have seen (*r*), the Act provides that such a remainder as this shall, in the event of the particular estate determining before the contingent remainder vests, be capable of taking effect in all respects as if the contingent remainder had originally been created as a springing or shifting use or executory devise, or other executory limitation. The force of the words "or other executory limitation" is not very apparent.

**Alienation of
executory
interests.**

Example.

The alienation of an executory interest, before its becoming an actually vested estate, was formerly subject to the same rules as governed the alienation of contingent remainders (*s*). But by the Act to amend the law of real property, all executory interests may now be disposed of by deed (*t*). Accordingly, to take our previous example, if a man should leave lands, by his will, to A. and his heirs, but in case A. should die under age, then to B. and his heirs,—B. may by deed, during A.'s minority, dispose of his expectancy to another person, who, should A. die under age, will at once stand in the place of B. and obtain the fee simple. But before the Act, this could not have been done; B. might indeed have sold his expectancy; but *after* the event (the decease of A. under age), B. must have executed a conveyance of the legal estate to the purchaser; for, until the event, B. had no *estate* to convey (*u*).

(*r*) Ante, p. 320.

(*s*) Ante, p. 326.

(*t*) Stat. 8 & 9 Vict. c. 106,

s. 6, repealing stat. 7 & 8 Vict.
c. 76, s. 5.

(*u*) Ante, p. 327.

In order to facilitate the payment of debts out of real estate, it is provided, by modern Acts of Parliament, that when lands are by law, or by the will of their owner, liable to the payment of his debts, and are by the will vested in any person by way of executory devise, the first executory devisee, even though an infant, may convey the whole fee simple in order to carry into effect any decree for the sale or mortgage of the estate for payment of such debts (*x*). And this provision, so far as it relates to a sale, has been extended to the case of the lands having descended to the heir, subject to an executory devise over in favour of a person or persons not existing or not ascertained

Similar to an estate arising by shifting use, or executory devise, is an estate which arises solely by the force of a statute, upon the execution of some statutory power. This occurs whenever an estate in land is transferred by any person by means of an authority conferred upon him by some statute, and not by means of the right of alienation incident to an estate in land or of a power given to him under the Statute of Uses or by a will. For example, by the Settled Land Act, 1882, a tenant for life under a settlement is empowered to convey the settled land by deed for all the estate and interest, which is the subject of the settlement, or for any less estate or interest, as may be required for carrying into effect the powers of leasing, sale, exchange, partition and other powers given by that Act (*z*). He may thus convey the whole legal estate in fee simple in the settled land, if comprised in the settlement, even though he himself should have merely an equitable estate for life (*a*). When a tenant for life exercises his power of conveyance under this Act, the legal estate in the settled land

arising by
force of
statute on
execution of
a statutory
power.

Conveyance
by tenant for
life under
Settled Land
Act, 1882.

) Stat. 11 Geo. IV. & 1 Will.
IV. c. 47, s. 12; 2 & 3 Vict. c. 60.

(y) Stat. 11 & 12 Vict. c. 87.

(z) Stat. 45 & 46 Vict. c. 38,

s. 20. See ante, pp. 52, 53, 169;
Williams's Conveyancing Stat-
utes, 321—325.

(a) See ante, pp. 201, 202.

OF INCORPOREAL HEREDITAMENTS.

Vesting
orders.

Declaration
vesting land
in future
trustees.

is, by the force of the statute, taken away from the persons, in whom it has been previously vested, and conveyed to the lessee, purchaser or other person, to the extent specified in the deed, by which the lease, purchase or other transaction is carried out. Thus the estate limited by such a deed arises solely by virtue of the Act, which has empowered the tenant for life to convey. The operation of the vesting orders, or orders directing that land, shall vest in some specified person for some specified estate, which the Court is authorized to make by the Trustee Acts, 1850 and 1852 (*b*), also furnishes an example of estates arising by force of statute upon the execution of a statutory authority. Another instance is afforded by the effect of a declaration made by a person appointing new trustees under the authority of the Conveyancing Act of 1881, that the estate in any land, which is subject to the trust, shall vest in the persons who will thenceforward be the trustees (*c*).

SECTION II.

Of the Time within which Executory Interests must arise.

The time
within which
an executory
interest must
arise.

Secondly, as to the time within which an executory estate or interest must arise. It is evident that some limit must be fixed; for if an unlimited time were allowed for the creation of these future and indestructible estates, the alienation of lands might be henceforward for ever prevented by the innumerable future estates which the caprice or vanity of some owners would prompt them to create. A limit has, therefore, been fixed on for the creation of executory interests;

(*b*) Stats. 13 & 14 Vict. c. 60;
15 & 16 Vict. c. 55. See ante,
pp. 206, 207.

See ante, p. 210; Williams's
Conveyancing Statutes, 181—
184.

and every executory interest which might, under any circumstances, transgress this limit, is void altogether. With regard to future estates of a destructible kind, namely, contingent remainders, we have seen (*d*) that a limit to their creation is contained in the maxim that no remainder can be given to the unborn child of a living person for his life, followed by a remainder to any of the issue of such unborn person:—the latter of such remainders being absolutely void. This maxim, it is evident, in effect, forbids the tying up of lands for a longer period than can elapse until the unborn child of some living person shall come of age; that is, for the life of a party now in being, and for twenty-one years after,—with a further period of a few months during gestation, supposing the child should be of posthumous birth. In analogy, therefore, to the restriction thus imposed on the creation of contingent remainders (*e*), the law has fixed the following limit to the creation of executory interests; it will allow any executory estate to commence within the period of any fixed number of now existing lives, and an additional term of twenty-one years; allowing further for the period of gestation, should gestation actually exist (*f*). This additional term of twenty-one years may be independent or not of the minority of any person to be entitled (*g*); and if no lives are fixed on, then the term of twenty-one years only is allowed (*h*). But every executory estate which might, in any event, transgress this limit, will from its commencement be absolutely void. For instance, a gift to the first son of A., a living person, who shall attain the age of twenty-four years, is a void gift (*i*).

Limit to the creation of executory interests.

Example

(*d*) Ante, p. 323.

(*e*) Per Lord Kenyon, in *Long v. Blackall*, 7 T. Rep. 102. See also 1 Sand. Uses, 197 (205, 5th ed.).

(*f*) Fearn, Cont. Rem. 430 et

(*g*) *Cadell v. Palmer*, 7 Bligh, N. S. 202.

(*h*) 1 Jarm. Wills, 253, 4th ed.; Lewis on Perpetuities, 172.

(*i*) *Newman v. Newman*, 10 Sim. 51; 1 Jarm. Wills, 263, 264, 4th ed.; *Griffith v. Blunt*, 4 Beav. 248.

For if A. were to die, leaving a son a few months old, the estate of the son would arise, under such a gift, at a time exceeding the period of twenty-one years from the expiration of the life of A., which, in this case, is the life fixed on. But a gift to the first son of A. who shall attain the age of twenty-one-years will be valid, as necessarily falling within the allowed period. When a gift is infected with the vice of its possibly exceeding the prescribed limit, it is at once and altogether void both at law and in equity. And even if, in its actual event, it should fall greatly within such limit, yet it is still as absolutely void as if the event had occurred which would have taken it beyond the boundary. If, however, the executory limitation should be in defeazance of, or immediately preceded by, an estate tail, then, as the estate tail and all subsequent estates may be barred by the tenant in tail, the remoteness of the event on which the executory limitation is to arise will not affect its validity (*k*).

Exception
where pre-
ceded by an
estate tail.

Executory

failure of
issue.

Executory limitations contained in instruments coming into operation after the 31st of December, 1882, are subject to a further restriction imposed by the Conveyancing Act, 1882 (*l*); in which it is enacted that, where there is a person entitled to land for an estate in fee, or for a term of years absolute or determinable on life, or for term of life, with an executory limitation over on default or failure of all or any of his issue, whether within or at any specified period or time or not, that executory limitation shall be or become void and incapable of taking effect, if and as soon as there is living any issue who has attained the age of twenty-one years of the class on default or failure whereof the limitation over was to take effect.

(*k*) Butler's note (*h*) to Fearn, Cont. Rem. 562; Lewis on Perpetuities, 669. See ante, p. 338, n. (*b*); *Heasman v. Pearse*, L. R.,

7 Ch. 275.

(*l*) Stat. 45 & 46 Vict. c. 39, s. 10. See Williams's Conveyancing Statutes, 288.

It will be observed that the Act to amend the law as ^{m)} applies only to a contingent remainder which would have been valid as a springing or shifting use or executory devise or other limitation, had it not had a sufficient estate to support it as a contingent remainder. A gift to the first son of B. who shall attain the age of twenty-one years is valid as a springing or shifting use or executory devise, when not preceded by an estate of freehold to turn it into a contingent remainder. But according to the rule above laid down, a gift to the first son of B. who shall attain the age of twenty-four years is void for remoteness, when not preceded by a particular estate of freehold. When so preceded it is, as we have seen (*n*), a good contingent remainder; but if the preceding estate which supports it should determine naturally before any son of B. should attain twenty-four, then this remainder will still fail, and can derive no support from the recent Act.

Cases to which the Act to amend the law as to contingent remainders does not apply.

Contingent remainders of trust estates (*o*) are void if they are limited, so that they may exceed the limit prescribed by law to the creation of executory interests (*p*). Thus, if land be conveyed unto and to the use of trustees and their heirs, upon trust for A. for life, and after his decease for such son of A. as shall first attain the age of twenty-four years, the limitation to the son of A. is void for remoteness (*q*). The reason for this distinction between legal and equitable estates (*r*) is, that, in the case of the latter, the feudal possession is with the trustees, and the rule of law, that a contingent remainder would fail if it did not vest before or at the moment of the determination of the

Contingent remainders of trust estates.

(*m*) Stat. 40 & 41 Vict. c. 33, ante, pp. 320, 366.

(*n*) Ante, p. 320.

(*o*) Ante, p. 334.

(*p*) *Abbiss v. Burney*, 17 Ch. D. 211, 229, 233.

(*q*) Ante, p. 369.

(*r*) See ante, p. 320.

particular estate, cannot apply (s). And equity, in giving effect to contingent remainders of trust estates, has held them to be subject to the rules as to remoteness, which apply to executory interests.

Restriction on
accumulation.

Mr. Thellus-
son's will.

Stat. 39 & 40
Geo. III. c. 98.

In addition to the limit already mentioned, a further restriction has been imposed by a modern Act of Parliament (t), on attempts to accumulate the income of property for the benefit of some future owner. This Act was occasioned by the extraordinary will of the late Mr. Thellusson, who directed the income of his property to be accumulated during the lives of all his children, grandchildren and great grandchildren *who were living at the time of his death*, for the benefit of some future descendants to be living at the decease of the survivor (u); thus keeping strictly within the rule which allowed any number of existing lives to be taken as the period for an executory interest. To prevent the repetition of such a cruel absurdity, the Act forbids the accumulation of income for any longer term than the life of the grantor or settlor, *or* twenty-one years from the death of any such grantor, settlor, deviser or testator, *or* during the minority of any person living, *or* in *rente sa mère* at the death of the grantor, deviser or testator, *or* during the minority only of any person who, under the settlement or will, would for the time being, if of full age, be entitled to the income so directed to be accumulated (x). But the Act does not extend (y) to any provision for payment of debts, or for raising portions for children (z), or to any direction touching the

(s) Ante, pp. 318—321, 334.

(t) Stat. 39 & 40 Geo. III. c. 98; Fearne, Cont. Rem. 538, n. (x).

(u) 4 Vcs. 227; Fearne, Cont. Rem. 436, note.

(x) *Wilson v. Wilson*, 1 Sim., N. S. 288.

(y) Sect. 3.

(z) See *Halford v. Stains*, 16 Sim. 488, 496; *Bacon v. Procter*, Turn. & Russ. 31; *Bateman v. Hodgkin*, 10 Beav. 426; *Barrington v. Liddell*, 2 De Gex, M. & G. 480; *Edwards v. Tuck*, 3 De Gex, M. & G. 40.

produce of timber or wood. Any direction to accumulate income, which may exceed the period thus allowed, is valid to the extent of the time allowed by the Act, but void so far as this time may be exceeded (*a*). And if the direction to accumulate should exceed the limits allowed by law for the creation of executory interests, it will be void altogether, independently of the above Act (*b*).

(*a*) 1 Jarm. Wills, 306, 4th ed.
See *Re Lady Rosslyn's Trust*, 16
Sim. 391; *Ralph v. Carrick*, 5 Ch.
D. 984, 997, 998.

(*b*) *Lord Southampton v. Marquis
of Hertford*, 2 Ves. & Bea. 54;

Ker v. Lord Dungannon, 1 Dr. &
War. 509; *Curtis v. Lukin*, 5 Beav.
147; *Broughton v. James*, 1 Coll.
26; *Scarisbrick v. Skelmersdale*, 17
Sim. 187; *Turrin v. Newcome*, 3
Kay & J. 16.

CHAPTER IV.

OF HEREDITAMENTS PURELY INCORPOREAL.

Three kinds of
purely incor-
poreal here-
ditaments.

WE now come to the consideration of incorporeal hereditaments, usually so called, which, unlike a reversion, a remainder, or an executory interest, are ever of an incorporeal nature, and never assume a corporeal shape. Of these purely incorporeal hereditaments there are three kinds, namely, first, such as are *appendant* to corporeal hereditaments; secondly, such as are *appurtenant*; both of which kinds of incorporeal hereditaments are transferred simply by the conveyance, by whatever means, of the corporeal hereditaments to which they may belong; and, thirdly, such as are *in gross*, or exist as separate and independent subjects of property, and which are accordingly said to lie in grant, and have always required a deed for their transfer (*a*). But almost all purely incorporeal hereditaments may exist in both the above modes, being at one time *appendant* or *appurtenant* to corporeal property, and at another time separate and distinct from it.

A seignory.

1. Of incorporeal hereditaments which are *appendant* to such as are corporeal, the first we shall consider is a seignory or lordship. In a previous part of our work (*b*) we have noticed the origin of manors. Of such of the lands belonging to a manor as the lord granted out in fee simple to his free tenants, nothing remained to him but his seignory or lordship. By the grant of an estate

a) Ante, p. 288.

(b) Ante, p. 147.

in fee simple, he necessarily parted with the feudal possession. Thenceforth his interest, accordingly, became incorporeal in its nature. But he had no reversion; for no reversion can remain, as we have already seen (c), after an estate in fee simple. The grantee, however, became his tenant, did to him fealty, and paid to him his rent-service, if any were agreed for. This simply having a free tenant in fee simple was called a seignory. To this seignory the rent and fealty were incident, and the seignory itself was attached or appendant to the manor of the lord, who had made the grant; whilst the land granted out was said to be holden of the manor. Very many grants were thus made, until the passing of the statute of *Quia emptores* (d) put an end to these creations of tenancies in fee simple, by directing that on every such conveyance the feoffee should hold of the same chief lord as his feoffor held before (e). But such tenancies in fee simple as were then already subsisting were left untouched, and they still remain in all cases in which freehold lands are holden of any manor. The incidents of such a tenancy, so far as respects the tenant, have been explained in the chapter on the tenure of an estate in fee simple. The correlative rights belonging to the lord form the incidents of his seignory. The seignory, with all its incidents, is an appendage to the manor of the lord, and a conveyance of the manor simply, without mentioning its appendant seignories, will accordingly comprise the seignories, together with all rents incident to them (f). In ancient times it was necessary that the tenants should attorn to the feoffee of the manor, before the rents and services could effectually pass to him (g). For, in this respect, the owner of a seignory was in the same position as

Attornment.

(c) Ante, pp. 301, 302.

(d) 18 Edw. I. c. 1.

(e) Ante, pp. 85, 144.

(f) Perk. s. 116.

(g) Co. Litt. 310 b.

the owner of a reversion (*h*). But the same statute (*i*) which abolished attornment in the one case abolished it also in the other. No attornment, therefore, is now required.

Rights of
common.

Common of
pasture.

Commons.

Other kinds of appendant incorporeal hereditaments are rights of *common*, such as *common of turbary*, or a right of cutting turf in another person's land; *common of piscary*, or a right of fishing in another's water; and *common of pasture*, which is the most usual, being a right of depasturing cattle on the land of another (*k*). The rights of common now usually met with are of two kinds; one where the tenants of a manor possess rights of common over the wastes of the manor, which belong to the lord of the manor, subject to such rights (*l*); and the other, where the several owners of strips of land, composing together a common field, have at certain seasons a right to put in cattle to range over the whole (*m*). The inclosure of commons, so frequent of late years, has rendered much less usual than formerly the right of common possessed by tenants of manors over the lord's wastes. These inclosures were formerly effected by private Acts of Parliament, obtained for the purpose of each particular inclosure, subject to the provisions of the General Inclosure Act (*n*), which contained general regulations applicable to all. But by an Act of Parliament of the present reign (*o*) commis-

(*h*) Ante, p. 296.

(*i*) Stat. 4 & 5 Anne, c. 3 (c. 16 in Ruffhead), s. 9; ante, p. 297.

(*k*) For further information upon this subject the reader is referred to the late author's *Treatise on Rights of Common*.

(*l*) Ante, p. 146. See *Smith v. Earl Brownlow*, L. R., 9 Eq. 241; *Warrick v. Queen's College*, L. R., 10 Eq. 105, affirmed L. R., 6 Ch. Ap. 716; *Betts v. Thompson*, L. R.,

6 Ch. Ap. 732; *Hall v. Byron*, 4 Ch. Div. 667.

(*m*) See ante, p. 146.

(*n*) 41 Geo. III. c. 109; see also stats. 3 & 4 Will. IV. c. 87; 3 & 4 Vict. c. 31.

(*o*) Stat. 8 & 9 Vict. c. 118, amended and extended by stats. 9 & 10 Vict. c. 70; 10 & 11 Vict. c. 111; 11 & 12 Vict. c. 99; 12 & 13 Vict. c. 83; 15 & 16 Vict. c. 79; 17 & 18 Vict. c. 97; 20 & 21 Vict.

sioners were appointed, styled the Inclosure Commissioners for England and Wales, under whose sanction inclosures were more readily effected, several local inclosures being comprised in one Act. The same commissioners were also invested with powers for facilitating the drainage of lands (*p*). The Inclosure Commissioners are now styled the Land Commissioners for England (*q*). By a recent Act provision has been made for the improvement, protection and management of commons near the metropolis, by means of schemes for the purpose, to be certified by the same commissioners and confirmed by Act of Parliament (*r*). And an important Act has now been passed for facilitating the regulation and improvement of commons, and for amending the Acts relating to the inclosure of commons (*s*). The short title of this Act is "The Commons Act, 1876." This Act contains provisions, not only for the inclosure of commons, but also for their regulation and improvement when uninclosed. And if any

Drainage.

Metropolitan commons.

Commons Act,

c. 31; 22 & 23 Vict. c. 43; 31 & 32 Vict. c. 89; and 36 Vict. c. 19; and continued by stats. 14 & 15 Vict. c. 53; 21 & 22 Vict. c. 53; 23 & 24 Vict. c. 81; 25 & 26 Vict. c. 73, and ultimately by stat. 47 & 48 Vict. c. 53. The stat. 8 & 9 Vict. c. 118, contains (sect. 147) a remarkably useful provision, authorizing exchanges of lands whether inclosed or not. And this provision has since been extended to partition between owners of undivided shares (stat. 11 & 12 Vict. c. 99, s. 13, ante, p. 169), and to other hereditaments, rights and easements (stat. 12 & 13 Vict. c. 83, s. 7), and in other respects (see stats. 15 & 16 Vict. c. 79, ss. 31, 32; 17 & 18 Vict. c. 97, ss. 2, 5; 20 & 21 Vict. c. 31, ss. 4

—11; 22 & 23 Vict. c. 43, ss. 10, 11). Socage lands may be exchanged for gavelkind; *Minet v. Lemon*, 20 Beav. 269; 7 De Gex, M. & G. 340. And freeholds may be exchanged for copyholds; stat. 9 & 10 Vict. c. 70, s. 9.

(*p*) Stats. 10 & 11 Vict. c. 38, and 24 & 25 Vict. c. 133; see also the statutes mentioned ante, pp. 41, 42.

(*q*) Stat. 45 & 46 Vict. c. 38, s. 48; see Williams's Conveyancing Statutes, 348—350.

(*r*) Stat. 29 & 30 Vict. c. 122, amended by stats. 32 & 33 Vict. c. 107, and 41 & 42 Vict. c. 71.

(*s*) Stat. 39 & 40 Vict. c. 56, amended by stat. 41 & 42 Vict. c. 56.

Suburban
commons.

Common
fields.

Advowson
appendant.

common is situate within six miles of any town having a population of not less than five thousand inhabitants, it is called a suburban common, and as such is subjected to special regulations for the benefit of the inhabitants of such town (*t*). Improved provisions have also been made for the allotment of field gardens for the poor, and of recreation grounds (*u*). The rights of common possessed by owners of land in common fields, however useful in ancient time, are now found greatly to interfere with the modern practice of husbandry; and Acts have accordingly been passed to facilitate the exchange (*x*) and separate inclosure (*y*) of lands in such common fields. Under the provisions of these Acts, each owner may now obtain a separate parcel of land, discharged from all rights of common belonging to any other person. The rights of common above spoken of, being appendant to the lands in respect of which they are exercised, belong to the lands of common right (*z*), by force of the common law alone, and not by virtue of any grant, express or implied. And any conveyance of the lands to which such rights belong will comprise such rights of common also (*a*). Another kind of appendant incorporeal hereditament is an advowson appendant to a manor. But on this head we shall reserve our observations till we speak of the now more frequent subject of conveyance, an advowson *in gross*, or an advowson unappended to any thing corporeal.

(*t*) Sect. 8.

(*u*) Stat. 39 & 40 Vict. c. 56, Part II., amended by stat. 42 & 43 Vict. c. 37.

(*x*) Stat. 4 & 5 Will. IV. c. 30.

(*y*) Stat. 6 & 7 Will. IV. c. 115, extended by stat. 3 & 4 Vict. c. 31. See also stats. 8 & 9 Vict. c. 118; 9 & 10 Vict. c. 70; 10 & 11 Vict. c. 111; 11 & 12 Vict. c. 99; 12 &

13 Vict. c. 83; 15 & 16 Vict. c. 79; 17 & 18 Vict. c. 97; 20 & 21 Vict. c. 31.

(*z*) Co. Litt. 122 a; Bac. Abr. tit. Extinguishment (C). See, however, *Lord Dunraven v. Llewellyn*, 15 Q. B. 791; ante, p. 146, n. (*q*).

(*a*) Litt. s. 183; Co. Litt. 121 b.

In connection with the subject of commons, it may be mentioned that strips of waste land between an inclosure and a highway, and also the soil of the highway to the middle of the road, presumptively belong to the owner of the inclosure (*b*). And a conveyance of the inclosure (*c*), even by reference to a plan which does not comprise the highway (*d*), will carry with it the soil as far as one-half the road. But if the strips of waste land communicate so closely to a common as in fact to form part of it, they will then belong to the lord of the manor, as the owner of the common (*e*). Where a public way is foundrous, as such ways frequently were in former times, the public have by the common law a right to travel over the adjoining lands, and to break through the fences for that purpose (*f*). It is said that in former times the landowners, to prevent their fences being broken and their crops spoiled when the roads were out of repair, set back their hedges, leaving strips of waste at the side of the road, along which the public might travel without going over the lands under cultivation. Hence such strips are presumed to belong to the owners of the lands adjoining (*g*). Where lands adjoin a river, the soil of one-half of the river to the middle of the stream is presumed to belong to the owner of the adjoining lands (*h*). But if it be a tidal river, the soil up to high water mark appears presump-

(*b*) *Doe d. Pring v. Pearsey*, 7 B. & C. 304; *Scoones v. Morrell*, 1 Beav. 251.

(*c*) *Simpson v. Dendy*, 8 C. B., N. S. 433; see *Leigh v. Jack*, 5 Ex. D. 264.

(*d*) *Berridge v. Ward*, 30 L. J., C. P. 218; 10 C. B., N. S. 400.

(*e*) *Grose v. West*, 7 Taunt. 39; *Doe d. Barrett v. Kemp*, 2 Bing. N. C. 102.

(*f*) Com. Dig. tit. Chimin, (D.

6); *Dawes v. Hawkins*, 8 C. B., N. S. 848.

(*g*) *Steel v. Prickett*, 2 Stark. 468.

(*h*) Hale de jure maris, ch. 1; *Wishart v. Wylic*, 2 Stuart, Thomson, Milne, Morison & Kinnear's Scotch Cases, H. L. 68; *Bickett v. Morris*, L. Rep., 1 Scotch Appeals, 47; *Lord v. The Commissioners for the City of Sydney*, 12 Moore's P. C. Cases, 473.

Sea-shore.

tively to belong to the Crown (*i*). The Crown is also presumptively entitled to the sea-shore up to high water mark of medium tides (*k*); although grants of parts of the sea-shore have not unfrequently been made to subjects (*l*); and such grants may be presumed by proof of long continued and uninterrupted acts of ownership (*m*). A sudden irruption of the sea gives the Crown no title to the lands thrown under water (*n*), although when the sea makes gradual encroachments, the right of the owner of the land encroached on is as gradually transferred to the Crown (*o*). And in the same manner when the sea gradually retires, the right of the Crown is as gradually transferred to the owner of the land adjoining the coast (*p*). But a sudden dereliction of the sea does not deprive the Crown of its title to the soil (*q*).

Appurtenant
incorporeal
hereditaments
by grant
or prescrip-
tion.

Appurtenant
rights of com-
mon and of
way.

2. Incorporeal hereditaments *appurtenant* to corporeal hereditaments are not very often met with. They consist of such incorporeal hereditaments as are not naturally and originally appendant to corporeal hereditaments, but have been annexed to them, either by some express deed of grant or by *prescription* from long enjoyment. Rights of common and rights of way or passage over the property of another person are the principal kinds of incorporeal hereditaments usually found appurtenant to lands. When thus annexed, they will pass by a conveyance of the lands to which they have been annexed, without mention of the appur-

(*i*) Hale *de jure maris*, ch. 4, p. 13; *Gunn v. The Freefishers of Whitstable*, 11 H. of L. Cas. 192.

(*k*) *Attorney-General v. Chambers*, 4 De Gex, M. & G. 206; *The Queen v. Gee*, 1 Ellis & Ellis, 1068.

(*l*) *Scrutton v. Brown*, 4 B. & C. 485, 495.

(*m*) *The Duke of Beaufort v. The Mayor, &c. of Swansea*, 3 Ex. 413; *Calmady v. Rowe*, 6 C. B. 861.

(*n*) 2 Black. Com. 262.

(*o*) *Re Hull and Selby Railway*, 5 Mee. & Wels. 327.

(*p*) 2 Bl. Com. 262; *The King v. Lord Yarborough*, 3 B. & C. 91; 5 Bing. 163.

(*q*) 2 Black. Com. 262.

tenances (*r*) ; although these words, “with the appurtenances,” have been usually inserted in conveyances, for the purpose of distinctly showing an intention to comprise such incorporeal hereditaments of this nature as may belong to the lands. But if such rights of common or of way, though usually enjoyed with the lands, should not have been strictly appurtenant to them, a conveyance of the lands merely, with their appurtenances, without mentioning the rights of common or way, would not have been sufficient to comprise them (*s*). It was, therefore, usual in conveyances to insert at the end of the “parcels,” or description of the property, a number of “general words” in which were comprised, not only all rights of way and common, &c., which might belong to the premises, but also such as might be therewith used or enjoyed (*t*). A change was made in the law on this point by the 6th section of the Conveyancing and Law of Property Act, 1881 (*u*), the effect of which may be shortly stated as follows:—A conveyance of land made after the 31st December, 1881, is to be deemed to include and by virtue of the Act operates to convey, with the land, all commons, ways and other liberties, privileges, easements, rights and advantages whatsoever reputed to appertain to, or at the time of conveyance enjoyed with, the land or any part thereof. But the above section applies

Appurtenance.

(*r*) Co. Litt. 121 b.

(*s*) *Harding v. Wilson*, 2 B. & Cres. 96 ; *Barlow v. Rhodes*, 1 Cro. & M. 439. See also *James v. Plant*, 4 Adol. & Ellis, 749 ; *Hinchliffe v. Earl of Kinnoul*, 5 New Cases, 1 ; *Pheysey v. Vicary*, 16 Mee. & Wels. 484 ; *Ackroyd v. Smith*, 10 C. B. 164 ; *Worthington v. Gimson*, Q. B., 6 Jur., N. S. 1053 ; 2 Ellis & Ellis, 618 ; *Baird v. Fortune*, H. L., 10 W. R. 2 ; 7 Jur., N. S. 926 ; *Wardle v. Brocklehurst*, 1

Ellis & Ellis, 1058 ; *Watts v. Nelson*, L. R., 6 Ch. 166 ; *Kay v. Oxley*, L. R., 10 Q. B. 360 ; *Brett v. Clowser*, 5 C. P. D. 376 ; *Barkshire v. Grubb*, 18 Ch. D. 616.

(*t*) Ante, p. 228. As to the effect of general words, see Williams's Conveyancing Statutes, 60, 65, 66 ; Williams on Commons, 316—319, 323.

(*u*) Stat. 44 & 45 Vict. c. 41 ; Williams's Conveyancing Statutes, 60—74.

only if and as far as a contrary intention is not expressed in the conveyance, and has effect subject to the terms thereof (*q*). In consequence of this enactment general words are now rarely employed (*r*).

3. Such incorporeal hereditaments as stand separate and alone are generally distinguished from those which are appendant or appurtenant, by the appellation *in gross*. Of these the first we may mention is a seignory *in gross*, which is a seignory that has been severed from the demesne lands of the manor, to which it was anciently appendant (*s*). It has now become quite unconnected with anything corporeal, and, existing as a separate subject of transfer, it must be conveyed by deed of grant.

Rent seck.

The next kind of separate incorporeal hereditament is a rent seck (*redditus siccus*), a dry or barren rent, so called, because no distress could formerly be made for it (*t*). This kind of rent forms a good example of the antipathy of the ancient law to any inroad on the then prevailing system of tenures. If a landlord granted his seignory, or his reversion, the rent service, which was incident to it, passed at the same time. But if he should have attempted to convey his rent, independently of the seignory or reversion to which it was incident, the grant would have been effectual to deprive himself of the rent, but not to enable his grantee to distrain for it (*u*). It would have been a *rent seck*. Rent seck also occasionally arose from grants being made of rent charges, to be hereafter explained, without any clause of distress (*x*). But, by an Act of

(*q*) Sect. 6, subs. 4.

(*t*) Litt. s. 218.

(*r*) See Williams's Conveyancing Statutes, 69, 497, and post, Part VI.

(*u*) Litt. ss. 225, 226, 227, 228, 572.

(*x*) Litt. ss. 217, 218.

(*s*) 1 Scriv. Cop. 5.

Geo. II. (y), a remedy by distress was given for rent seck, in the same manner as for rent reserved upon lease.

Another important kind of separate incorporeal hereditament is a rent charge, which arises on a grant by one person to another, of an annual sum of money, payable out of certain lands in which the grantor may have any estate. The rent charge cannot, of course, continue longer than the estate of the grantor; but, supposing the grantor to be seised in fee simple, he may make a grant of a rent charge for any estate he pleases, giving to the grantee a rent charge for a term of years, or for his life, or in tail, or in fee simple (z). For this purpose a *deed* is absolutely necessary; for a rent charge, being a separate incorporeal hereditament, cannot, according to the general rule, be created or transferred in any other way (a), unless indeed it be given by will. The creation of a rent charge or annuity, for any life or lives, or for any term of years or greater estate determinable on any life or lives, was also, until recently, required, under certain circumstances, to be attended with the enrolment, in the Court of Chancery, of a memorial of certain particulars. These annuities were frequently granted by needy persons to money lenders, in consideration of the payment of a sum of money, for which the annuity or rent charge served the purpose of an exorbitant rate of interest. In order, therefore, to check these proceedings by giving them publicity, it was provided that, as to all such annuities, granted for pecuniary consideration or money's worth (b), (unless secured on lands of equal or greater annual value than the annuity, and of

A rent charge.

A deed required.

Enrolment of memorial of annuities for lives granted for pecuniary consideration.

(y) Stat. 4 Geo. II. c. 28, s. 5.

(z) Litt. ss. 217, 218.

(a) Litt. ubi sup.

(b) *Tetley v. Tetley*, 4 Bing.

214; *Mentlayer v. Biggs*, 1 Cro.

Mee. & Rose. 110; *Few v. Backhouse*, 8 Ad. & Ell. 789; *S. C.* 1

Per. & Dav. 34; *Doe d. Church*

v. Pontifer, 9 C. B. 229.

Now unneces-
sary.

Registration
of annuities
now required.

which the grantor was seised in fee simple, or fee tail in possession,) a memorial stating the date of the instrument, the names of the parties and witnesses, the persons for whose lives the annuity was granted, the person by whom the same was to be beneficially received, the pecuniary consideration for granting the same, and the annual sum to be paid, should, within thirty days after the execution of the deed, be inrolled in the Court of Chancery; otherwise the same should be null and void to all intents and purposes (*c*). But as these annuities were only granted for the sake of evading the Usury Laws, the same statute which repealed those laws (*d*) also repealed the statutes by which memorials of such annuities were required to be inrolled. A subsequent statute, however, provides, that any annuity or rent charge granted after the passing of the Act (the 26th of April, 1855), otherwise than by marriage settlement or will, for a life or lives, or for any estate determinable on a life or lives, shall not affect any lands, tenements or hereditaments, as to purchasers, mortgagees or creditors, unless registered in manner therein provided in the Court of Common Pleas (*e*). The registration of annuities is now made in the Central Office of the Supreme Court, where they

(*c*) Stat. 53 Geo. III. c. 141, explained and amended by stats. 3 Geo. IV. c. 92, and 7 Geo. IV. c. 75, which rendered sufficient a memorial of the names of the witnesses as they appeared signed to their attestations.

(*d*) Stat. 17 & 18 Vict. c. 90.

(*e*) Stat. 18 & 19 Vict. c. 15, ss. 12, 14. It has been decided that rent charges are valid in equity as against persons, who have notice of them, although they be not registered; *Greaves v. Tyfield*, 14 Ch. D. 563. This was so decided in accordance with the

doctrines applied by the Courts of Equity in the construction of the Middlesex and Yorkshire Registry Acts. See ante, p. 232. To a learned judge, who attained eminence in Courts of Common Law, these doctrines (in common with a good many other doctrines of Courts of Equity) have appeared to be "the result of a disregard of general principles and general rules in the endeavour to do justice more or less fanciful in certain particular cases." See 14 Ch. D. 578.

are entered in alphabetical order by the name of the person whose estate is intended to be affected (*f*). A search for annuities is accordingly made in this registry on every purchase of lands, in addition to the searches for judgments, crown debts, executions and *lis pendens* (*g*).

In settlements where rent charges are often given by way of pin-money and jointure, they are usually created under a provision for the purpose contained in the Statute of Uses (*h*). The statute directs that, where any persons shall stand seised of any lands, tenements, or hereditaments, in fee simple or otherwise, *to the use and intent* that some other person or persons shall have yearly to them and their heirs, or to them and their assigns, for term of life or years or some other special time, any annual rent, in every such case the same persons, their heirs and assigns, *that have such use* to have any such rent shall be adjudged and deemed in possession and seisin of the same rent of such estate as they had in the use of the rent; and they may distrain for non-payment of the rent in their own names. From this enactment it follows, that if a conveyance of lands be now made to A. and his heirs,—*to the use* and intent that B. and his assigns may, during his life, thereout receive a rent charge,—B. will be entitled to the rent charge, in the same manner as if a grant of the rent charge had been duly made to him by deed. The above enactment, it will be seen, is similar to the prior clause of the Statute of Uses relating to uses of estates (*i*), and is merely a carrying out of the same design, which was to render every use, then cognizable only in Chancery, an estate or interest within the juris-

Creation of
rent charges
under the
Statute of
Uses.

(*f*) See Williams's Conveyancing Statutes, 268.

112, 114, 117, 118.

(*h*) Stat. 27 Hen. VIII. c. 10, ss. 4, 5.

(*i*) Ante, p. 188.

diction of the courts of law (*k*). But in this case, also, as well as in the former, the end of the statute has been defeated. For a conveyance of land to A. and his heirs, *to the use* that B. and his heirs may receive a rent charge, *in trust* for C. and his heirs, will now be laid hold of under the equitable doctrines of the Court of Chancery for C.'s benefit, in the same manner as a trust of an estate in the land itself. The statute vests the *legal estate* in the rent in B.; and C. takes no legal estate, because the trust for him would be a use upon a use (*l*). But C. has the entire beneficial interest; and he is possessed of the rent charge for an *equitable estate* in fee simple.

Clause of

In ancient times it was necessary, on every grant of a rent charge, to give an express power to the grantee to distrain on the premises out of which the rent charge was to issue (*m*). If this power were omitted, the rent was merely a *rent seck*. Rent service, being an incident of tenure, might be distrained for by common right; but rent charges were matters the enforcement of which was left to depend solely on the agreement of the parties. But since a power of distress has been attached by Parliament (*n*) to rents seck, as well as to rents service, an express power of distress has not been necessary for the security of a rent charge (*o*). Such a power, however, was usually granted in express terms. In addition to the clause of distress, it was also usual, as

Power of
entry.

Ante, p. 190.
(*l*) Ante, p. 191.
(*m*) Litt. s. 218.
(*n*) Stat. 4 Geo. II. c. 28, s. 5;
ante, pp. 382, 383. See *Johnson v.*
Faulkner, 2 Q. B. 925, 935; *Mil-*

ler v. Green, 8 Bing. 92; 2 Cro.
& Jerv. 142; 2 Tyr. 1.
(*o*) *Saward v. Anstey*, 2 Bing.
519; *Buttery v. Robinson*, 3 Bing.
392; *Dodds v. Thompson*, L. R.,
1 C. P. 133.

the rents and profits until all the arrears of the rent charge, together with all expenses, should have been duly paid.

The following remedies are now given by the 44th section of the Conveyancing and Law of Property Act, 1881 (*p*), to any person entitled to a rent charge or any other annual sum, payable half-yearly or otherwise, not being rent incident to a reversion, charged upon any land, or the income thereof, by virtue of any instrument coming into operation after the 31st December, 1881 :—(1) a power of distress, if the annual sum or any part thereof is unpaid for *twenty-one* days next after the time appointed for any payment in respect thereof; (2) a power, if the annual sum or any part thereof is unpaid for *forty* days next after the time appointed for any payment in respect thereof, to enter into possession of and hold the land charged or any part thereof, without impeachment of waste, and to take the income thereof, until all arrears due at the time of entry or afterwards becoming due and all expenses have been fully paid; (3) a power, in the like case, whether possession be taken or not, to demise by deed the land charged or any part thereof to a trustee for a term of years, upon trust to raise and pay all arrears due or to become due and all expenses. These statutory remedies are conferred, subject and without prejudice to all estates, interests and rights having priority to the annual sum, and only as far as they might have been conferred by the instrument under which the annual sum arises (*q*). The above section applies only if and as far as a contrary intention is not expressed in that instrument, and has effect subject to the terms thereof (*r*). Reliance upon this section has

(*p*) Stat. 44 & 45 Vict. c. 41.
See Williams's Conveyancing
Statutes, 215—217.

(*q*) Sect. 44, subs. (1).
(*r*) Sect. 44, subs. (5).

generally superseded the employment of express powers of distress and entry upon the grant of a rent charge (*s*).

Estate for life

Incorporeal hereditaments are the subjects of estates analogous to those which may be holden in corporeal hereditaments. If therefore a rent charge should be granted for the life of the grantee, he will possess an estate for life in the rent charge. Supposing that he should alienate this life estate to another party, without mentioning in the deed of grant the heirs of such party, the law formerly held that, in the event of the decease of the second grantee in the lifetime of the former, the rent charge became extinct for the benefit of the owner of the lands out of which it issued (*t*). The former grantee was not entitled because he had parted with his estate; the second grantee was dead, and his heirs were not entitled because they were not named in the grant. Under similar circumstances, we have seen (*u*) that, in the case of a grant of corporeal hereditaments, the first person that might happen to enter upon the premises after the decease of the second grantee had formerly a right to hold possession during the remainder of the life of the former. But rents and other incorporeal hereditaments are not in their nature the subjects of occupancy (*x*); they do not lie exposed to be taken possession of by the first passer-by. It was accordingly thought that the statutes, which provided a remedy in the case of lands and other corporeal hereditaments, were not applicable to the case of a rent charge, but that it became extinct as before mentioned (*y*). By a modern decision, however, the construction of these statutes was extended to this case also (*z*); and now the Act for the amendment of the

(*s*) See Williams's Conveyancing Statutes, 216, 217, 519.

(*t*) Bac. Abr. tit. Estate for Life and Occupancy (B).

(*u*) Ante, p. 26.

(*x*) Co. Litt. 41 b, 388 a.

(*y*) 2 Black. Com. 260.

(*z*) *Bearpark v. Bing*. 178.

laws with respect to wills (*a*), by which these statutes have been repealed (*b*), permits every person to dispose by will of estates *pur autre vie*, whether there shall or shall not be any special occupant thereof, and whether the same shall be a corporeal or an incorporeal hereditament (*c*); and in case there shall be no special occupant, the estate, whether corporeal or incorporeal, shall go to the executor or administrator of the party; and coming to him, either by reason of a special occupancy, or by virtue of the Act, it shall be applied and distributed in the same manner as the personal estate of the testator or intestate (*d*).

The Wills Act, as to estates *pur autre vie*.

A grant of an estate tail in a rent charge scarcely ever occurs in practice. But grants of rent charges for estates in fee simple are not uncommon, especially in the towns of Liverpool and Manchester, where it is the usual practice to dispose of an estate in fee simple in lands for building purposes in consideration of a rent charge in fee simple by way of ground rent, to be granted out of the premises to the original owner. These transactions are accomplished by a conveyance from the vendor to the purchaser and his heirs, *to the use* that the vendor and his heirs may thereout receive the rent charge agreed on, [and *to the further use* that, if it be not paid within so many days, the vendor and his heirs may distrain, and *to the further use* that, in case of non-payment within so many more days, the vendor and his heirs may enter and hold possession till all arrears and expenses are paid;] and subject to the rent charge, [and to the powers and remedies for securing payment thereof,] *to the use* of the purchaser, his heirs and assigns for ever. The words within brackets in the above sentence may now be omitted in

Estate in fee simple in a rent charge.

(*a*) 7 Will. IV. & 1 Vict. c. 26.

(*b*) Sect. 2.

(*c*) Sect. 3.

(*d*) Sect. 6; *Reynolds v. I*
25 Beav. 100.

reliance on the provisions of the Conveyancing Act of 1881, which have been already stated (*e*). The purchaser thus acquires an estate in fee simple in the lands, subject to a perpetual rent charge payable to the vendor, his heirs and assigns (*f*). It should, however, be carefully borne in mind, that transactions of this kind are very different from those grants of fee simple estates which were made in ancient times by lords of manors, and from which quit or chief rents have arisen. These latter rents are rents incident to tenure, and may be distrained for of common right without any express clause for the purpose. But as we have seen (*g*), since the passing of the statute of *Quia emptores* (*h*), it has not been lawful for any person to create a tenure in fee simple. The modern rents of which we are now speaking, are accordingly mere rent charges, and in ancient

(*e*) See ante, p. 387; Williams's Conveyancing Statutes, 217.

(*f*) By stat. 17 & 18 Vict. c. 83, conveyances of any kind, in consideration of an annual sum payable in perpetuity, or for any indefinite period, were subject to the following duties:—

Where the yearly sum should not exceed £5	£0	6	0
Should exceed £5 and not exceed 10	0	12	0
„ 10 „ 15	0	18	0
„ 15 „ 20	1	4	0
„ 20 „ 25	1	10	0
„ 25 „ 50	3	0	0
„ 50 „ 75	4	10	0
„ 75 „ 100	6	0	0

And when the sum should exceed £100, then for every £50, and also for any fractional part of

£50.. .. .	3	0	0
------------	---	---	---

But these duties are now repealed by stat. 33 & 34 Vict. c. 99; and the Stamp Act, 1870 (stat. 33 & 34 Vict. c. 97), now provides (sect. 72), that, where the consideration or any part of the consideration for a conveyance on sale consists of money payable periodically in perpetuity or for any indefinite period not terminable with life, such conveyance is to be charged in respect of such consideration with ad valorem duty on the total amount, which will or may, according to the terms of sale, be payable during the period of twenty years next after the day of the date of such instrument.

(*g*) Ante, pp. 85, 144.

(*h*) 18 Edw. I. c. 1.

days would have required express clauses of distress to make them secure. They were formerly considered in law as *against common right* (i), that is, as repugnant to the feudal policy, which encouraged such rents only as were incident to tenure. A rent charge was accordingly regarded as a thing entire and indivisible, unlike rent service, which was capable of apportionment. And from this property of a rent charge, the law, in its hostility to such charges, drew the following conclusion: that if any part of the land, out of which a rent charge issued, were released from the charge by the owner of the rent, either by an express deed of release, or virtually by his purchasing part of the land, all the rest of the land should enjoy the same benefit and be released also (k). If, however, any portion of the land charged should descend to the owner of the rent as heir at law, the rent would not thereby have been extinguished, as in the case of a purchase, but would have been apportioned according to the value of the land; because such portion of the land came to the owner of the rent, not by his own act, but by the course of law (l). But it is now provided (m), that the release from a rent charge of part of the hereditaments charged therewith shall not extinguish the whole rent charge, but shall operate only to bar the right to recover any part of the rent charge out of the hereditaments released; without prejudice, nevertheless, to the rights of all persons interested in the hereditaments remaining unreleased and not concurring in or confirming the release. A recent statute empowers the Commissioners, now styled the Land Commissioners (n), to apportion rents of every

A release of part of the land was a release of the whole.

Apportionment on descent of part of the land.

New enactment; release not now an

Apportion-

(i) Co. Litt. 147 b.

(k) Litt. s. 222; *Dennett v. Pass*,

1 New Cases, 388.

(l) Litt. s. 224.

(m) Stat. 22 & 23 Vict. c. 35,

s. 10; see *Booth v. Smith*, 14 Q. B. D. 318.

(n) See stat. 45 & 46 Vict. c. 38, s. 48; *Williams's Conveyancing Statutes*, 348—350.

kind on the application of any persons interested in the lands and in the rent (*o*).

Exoneration
of executors
and adminis-
trators from
liability to
pay rent
charges.

The rent charges of which we are speaking are usually further secured by a covenant for payment, entered into by the purchaser in the deed by which they are granted. In order to exonerate the executors or administrators of such a purchaser from perpetual liability under this covenant, it is now provided (*p*) that where an executor or administrator, liable as such to the rent or covenants contained in any conveyance on chief rent or rent charge, or agreement for such conveyance, granted to or made with the testator or intestate whose estate is being administered, shall have satisfied all then subsisting liabilities, and shall have set apart a sufficient fund to answer any future claim that may be made in respect of any fixed and ascertained sum agreed to be laid out on the property (although the period for laying out the same may not have arrived), and shall have conveyed the property, or assigned the agreement to a purchaser, he may distribute the residuary personal estate of the deceased without appropriating any part thereof to meet any future liability under such conveyance or agreement. But this is not to prejudice the right of the grantor or those claiming under him to follow the assets of the deceased into the hands of the persons amongst whom such assets may have been distributed.

Bankruptcy
of owner of
land subject
to rent,

The Bankruptcy Act, 1883 (*q*), provides for the disclaimer by the trustee for the creditors, within the time and under the conditions therein specified, of any part

(*o*) Stat. 17 & 18 Vict. c. 97,
ss. 10—14.

(*p*) Stat. 22 & 23 Vict. c. 35,
s. 28.

(*q*) Stat. 46 & 47 Vict. c. 52,
s. 55; see Williams on Personal
Property, 234, 12th ed.

of the property of the bankrupt, which consists of land of any tenure burdened with onerous covenants or of any other property that is not readily saleable, by reason of its binding the possessor thereof to the performance of any onerous act, or to the payment of any sum of money (*r*). The same Act further provides (*s*) that the Court may, on application by any person either claiming any interest in any disclaimed property, or under any liability not discharged by this Act in respect of any disclaimed property, make an order for the vesting of the property in or delivery thereof to any person entitled thereto, or to whom it may seem just that the same should be delivered by way of compensation for such liability as aforesaid, or a trustee for him, and on such terms as the Court thinks just; and on any such vesting order being made, the property comprised therein shall vest accordingly in the person therein named in that behalf without any conveyance or assignment for the purpose.

Although rent charges and other self-existing incorporeal hereditaments of the like nature are no favourites with the law, yet, whenever it meets with them, it applies to them, as far as possible, the same rules to which corporeal hereditaments are subject. Thus, we have seen that the estates which may be held in the one are analogous to those which exist in the other. So estates in fee simple, both in the one and in the other, may be aliened by the owner, either in his lifetime or by his will, to one person or to several as joint tenants or tenants in common (*t*), and, on his intestacy, will

Incorporeal
hereditamen

as possible, to
the same
rules as cor-
poreal heredi-
taments

(*r*) As to the effect of a disclaimer by a trustee in bankruptcy of freehold land subject to a rent charge and burdened with onerous covenants, see *Re Mercer and Moore*, 14 Ch. D. 287, decided

under the Bankruptcy Act, 1869, stat. 32 & 33 Vict. c. 71, ss. 23, 24.

(*s*) Stat. 46 & 47 Vict. c. 52, s. 55, subs. 6.

(*t*) *Rivis v. Watson*, 5 M. & W. 255.

Tenure an
exception.

descend to the same heir at law. But in one respect the analogy fails. Land is essentially the subject of *tenure*; it may belong to a lord, but be holden by his tenant, by whom again it may be sub-let to another; and so long as rent is rent service, a mere incident arising out of the estate of the payer, and belonging to the estate of the receiver, so long may it accompany, as accessory, its principal, the estate to which it belongs. But the receipt of a rent charge is accessory or incident to no other hereditament. True a rent charge springs from, and is, therefore, in a manner connected with, the land on which it is charged; but the receiver and owner of a rent charge has no shadow of interest beyond the annual payment, and in the abstract right to this payment his estate in the rent consists. Such an estate therefore cannot be subject to any tenure. The owner of an estate in a rent charge consequently owes no fealty to any lord, neither can he be subject, in respect of his estate, to any rent as rent service; nor, from the nature of the property, could any distress be made for such rent service if it were reserved (*u*). So, if the owner of an estate in fee simple in a rent charge should have died intestate, and without leaving any heirs, his estate could not escheat to his lord, for he had none. It simply ceased to exist, and the lands out of which it was payable were thenceforth discharged from its payment (*r*). The Intestates Estates Act, 1884 (*y*), now enacts that, from and after the passing of this Act, where a person dies without an heir and intestate in respect of any real estate, consisting of any estate or interest, whether legal or equitable in any incorporeal

(*u*) Co. Litt. 47 a, 144 a; 2 Black. Com. 42. But it is said that the Queen may reserve a rent out of an incorporeal hereditament, for which, by her prerogative, she may distrain on all the

lands of the lessee. Co. Litt. 47 a, note (1); Bac. Abr. tit. Rent (B).

(*r*) Co. Litt. 298 a, n. (2).

(*y*) Stat. 47 & 48 Vict. c. 71, s. 4, passed 14th August, 1884.

hereditament, whether devised or not devised to trustees by the will of such person, the law of escheat shall apply in the same manner as if the estate or interest above mentioned were a legal estate in corporeal hereditaments (z). It appears to the editor that the Courts may find some difficulty in applying the law of escheat, in pursuance of this Act, to hereditaments which are not held of any lord.

Another kind of separate incorporeal hereditament which occasionally occurs is a right of common *in gross*. Common in gross. This is, as the name implies, a right of common over lands belonging to another person, possessed by a man, not as appendant or appurtenant to the ownership of any lands of his own, but as an independent subject of property (a). Such a right of common has, therefore, always required a deed for its transfer.

Another important kind of separate incorporeal hereditament is an advowson in gross. An advowson is a perpetual right of presentation to an ecclesiastical benefice. The owner of the advowson is termed the patron of the benefice: but, as such, he has no property or interest in the glebe or tithes, which belong to the incumbent. As patron he simply enjoys a right of nomination from time to time, as the living becomes vacant. And this right he exercises by a *presentation*. Presentation. to the bishop of some duly qualified clerk or clergyman, whom the bishop is accordingly bound to *institute* to Institution. the benefice, and to cause him to be *inducted* into it (b). Induction. When the advowson belongs to the bishop, the forms of presentation and institution are supplied by an act called *collation* (c). Collation. In some rare cases of advowsons *donative*, the patron's deed of donation is alone suffi-

(z) See ante, pp. 155—157.

(a) 2 Black. Com. 33, 34.

(b) 1 Black. Com. 190, 191.

(c) 2 Black. Com. 22.

for resigna-
tion.

cient (*d*). And by the Stamp Act, 1870 (*e*), every appointment, whether by way of donation, presentation or nomination, and admission, collation or institution to or licence to hold any ecclesiastical benefice, dignity or promotion, or any perpetual curacy, was subject to an ad valorem duty, which is now repealed (*f*). Where the patron is entitled to the advowson as his private property, he is empowered by an Act of Parliament of the reign of George IV. (*g*) to present any clerk under a previous agreement with him for his resignation in favour of any one person named, or in favour of one of two (*h*) persons, each of them being by blood or marriage an uncle, son, grandson, brother, nephew, or grand-nephew of the patron, or one of the patrons beneficially entitled. One part of the instrument by which the engagement is made must be deposited within two calendar months in the office of the registrar of the diocese (*i*), and the resignation must refer to the engagement, and state the name of the person for whose benefit it is made (*k*).

History of
advowsons of
rectories.

Advowsons are principally of two kinds,—advowsons of rectories, and advowsons of vicarages. The history of advowsons of rectories is in many respects similar to that of rents and of rights of common. In the very early ages of our history advowsons of rectories appear to have been almost always appendant to some manor. The advowson was part of the manorial property of the lord, who built the church and endowed it with the glebe and most part of the tithes. The seignories in respect of which he received his rents were another part of his manor, and the remainder principally consisted of the demesne and waste lands, over the latter of which we

(*d*) 2 Black. Com. 23.

(*e*) Stat. 33 & 34 Vict. c. 97.

(*f*) By stat. 40 Vict. c. 13, s. 13.

(*g*) Stat. 9 Geo. IV. c. 94.

(*h*) The act reads one or two, but this is clearly an error.

(*i*) Stat. 9 Geo. IV. c. 94, s. 4.

(*k*) Sect. 5.

have seen that his tenants enjoyed rights of common as appendant to their estates (*l*). The incorporeal part of the property, both of the lord and his tenants, was thus strictly appendant or incident to that part which was corporeal; and any conveyance of the corporeal part naturally and necessarily carried with it that part which was incorporeal, unless it were expressly excepted. But, as society advanced, this simple state of things became subject to many innovations, and in various cases the incorporeal portions of property became severed from the corporeal parts, to which they had previously belonged. Thus we have seen (*m*) that the seignory of lands was occasionally severed from the corporeal part of the manor, becoming a seignory in gross. So rent was sometimes granted independently of the lordship or reversion to which it had been incident, by which means it at once became an independent incorporeal hereditament, under the name of a *rent seck*. Or a rent might have been granted to some other person than the lord, under the name of a *rent charge*. In the same way a *right of common* might have been granted to some other person than a tenant of the manor, by means of which grant a separate incorporeal hereditament would have arisen, as a *common in gross*, belonging to the grantee. In like manner there exist at the present day two kinds of advowsons of rectories; an advowson *appendant* to a manor, and an advowson *in gross* (*n*), which is a distinct subject of property, unconnected with any thing corporeal. Advowsons in gross appear to have chiefly had their origin from the severance of advowsons appendant from the manors to which they had belonged; and any advowson now appendant to a manor, may at any time be severed from it, either by a conveyance of the manor, with an express exception of the advowson, or by a grant of the advowson alone independently of the manor.

Origin of
advowsons
in gross.

(*l*) Ante, pp. 148, 376.

(*m*) Ante. p. 382.

(*n*) 2 Black. Com. 22; Litt.
s. 617.

Conveyance
of an advow-
son.

And when once severed from its manor, and made an independent incorporeal hereditament, an advowson can never become appendant again. So long as an advowson is appendant to a manor, a conveyance of the manor, even by feoffment, and without mentioning the appurtenances belonging to the manor, will be sufficient to comprise the advowson (*o*). But when severed, it must be conveyed, like any other separate incorporeal hereditament, by a deed of grant (*p*).

History of
advowsons of
vicarages.

The advowsons of rectories were not unfrequently granted by the lords of manors in ancient times to monastic houses, bishoprics and other spiritual corporations (*q*). When this was the case the spiritual patrons thus constituted considered themselves to be the most fit persons to be rectors of the parish, so far as the receipt of the tithes and other profits of the rectory was concerned; and they left the duties of the cure to be performed by some poor priest as their vicar or deputy. In order to remedy the abuses thus occasioned, it was provided by statutes of Richard II. (*r*), and Henry IV. (*s*), that the vicar should be sufficiently endowed wherever any rectory was thus *appropriated*. This was the origin of vicarages, the advowsons of which belonged in the first instance to the spiritual owners of the appropriate rectories as appendant to such rectories (*t*); but many of these advowsons have since, by severance from the rectories, been turned into advowsons in gross. And such advowsons of vicarages can only be conveyed by deed, like advowsons of rectories under similar circumstances.

(*o*) Perk. s. 116; Co. Litt. 190 b, 307 a. See *Attorney-General v. Sitwell*, 1 You. & Coll. 559; *Rooper v. Harrison*, 2 Kay & John. 86.

Co. Litt. 332 a, 335 b: see

Williams's Conveyancing Statutes, 72, 73.

(*q*) 1 Black. Com. 384.

(*r*) Stat. 15 Rich. II. c. 6.

(*s*) Stat. 4 Hen. IV. c. 12.

(*t*) Dyer. 351 a.

OF HEREDITAMENTS PURELY INCORPOREAL.

The sale of an advowson will not include the right to the *next presentation*, unless made when the church is full; that is, before the right to present has actually arisen by the death, resignation or deprivation of the former incumbent (*u*). For the present right to present is regarded as a personal duty of too sacred a character to be bought and sold; and the sale of such a right would fall within the offence of *simony*,—so called from Next
tation.
The church
must be full Si Simon Magus,—an offence which consists in the buying or selling of holy orders, or of an ecclesiastical benefice (*x*). But, before a vacancy has actually occurred, the next presentation, or right of presenting at the next vacancy, may be sold, either together with, or independently of, the future presentations of which the advowson is composed (*y*), and this is frequently done. No spiritual person, however, may sell or assign any patronage or presentation belonging to him by virtue of any dignity or spiritual office held by him, any such sale and assignment being void (*z*). And a clergyman is prohibited by a statute of Anne (*u*) from procuring preferment for himself by the purchase of a next presentation; but this statute does not prevent the purchase by a clergyman of an estate in fee or even for life in an advowson, with a view of presenting himself to the living (*b*). Next
A. 11. When the next presentation is sold, independently of the rest of the advowson, it is considered as mere personal property, and will devolve, in case of the decease of the purchaser before he has exercised his right, on his executors, and cannot descend to his heir at law (*c*). The advowson

(*u*) *Alston v. Atlay*, 7 Adol. & Ellis, 289.

(*x*) Bac. Abr. tit. Simony; stats. 31 Eliz. c. 6; 28 & 29 Vict. c. 122, ss. 2, 5, 9.

(*y*) *Fox v. Bishop of Chester*, 6 Bing. 1.

(*z*) Stat. 3 & 4 Vict. c. 113, s. 42.

(*a*) Stat. 12 Anne, stat. 2, c. 12, s. 2.

(*b*) *Walsh v. Bishop of Lincoln*, L. R., 10 C. P. 518; *Lowe v. Bishop of Chester*, 10 Q. B. D. 407.

(*c*) See *Bennett v. Bishop of Lincoln*, 7 Barn. & Cresn. 113; 8 Bing. 490.

itself, it need scarcely be remarked, will descend, on the decease of its owner intestate, to his heir. The law attributes to it, in common with other separate incorporeal hereditaments, as nearly as possible the same incidents as appertain to the corporeal property to which it once belonged.

Tithes.

Tithes are another species of separate incorporeal hereditaments, also of an ecclesiastical or spiritual kind. In the early ages of our history, and indeed down to the time of Henry VIII., tithes were exclusively the property of the Church, belonging to the incumbent of the parish, unless they had got into the hands of some monastery, or community of spiritual persons. They never belonged to any layman until the time of the dissolution of monasteries by King Henry VIII. But this monarch having procured Acts of Parliament for the dissolution of the monasteries and the confiscation of their property (*d*), also obtained by the same Acts (*e*) a confirmation of all grants made or to be made by his letters-patent of any of the property of the monasteries. These grants were many of them made to laymen, and comprised the tithes which the monasteries had possessed, as well as their landed estates. Tithes thus came for the first time into lay hands as a new species of property. As the grants had been made to the grantees and their heirs, or to them and the heirs of their bodies, or for term of life or years (*f*), the tithes so granted evidently became hereditaments in which estates might be holden, similar to those already known

Tithes in lay hands.

(*d*) Stat. 27 Hen. VIII. c. 28, intituled, "An Act that all Religious Houses under the yearly Revenue of Two Hundred Pounds shall be dissolved and given to the King and his heirs;" stat. 31 Hen. VIII. c. 13, intituled,

"An Act for the Dissolution of all Monasteries and Abbies;" and stat. 32 Hen. VIII. c. 24.

(*e*) 27 Hen. VIII. c. 28, s. 2; 31 Hen. VIII. c. 13, ss. 18, 19.

(*f*) Stat. 31 Hen. VIII. c. 13, s. 18; 32 Hen. VIII. c. 7, s. 1.

to be held in other hereditaments of a separate incorporeal nature; and a necessity at once arose of a law to determine the nature and attributes of these estates. How such estates might be conveyed, and how they should descend, were questions of great importance. The former question was soon settled by an Act of Parliament (g), which directed recoveries, fines and conveyances to be made of tithes in lay hands, according as had been used for assurances of lands, tenements and other hereditaments. And the analogy of the descent of estates in other hereditaments was followed in tracing the descent of estates of inheritance in tithes. But as tithes, being of a spiritual origin, are a distinct inheritance from the lands out of which they issue, they have not been considered as affected by any particular custom of descent, such as that of gavelkind or borough-English, to which the lands may be subject, but in all cases they descend according to the course of the common law (h). From this separate nature of the land and tithe, it also follows that the ownership of both by the same person will not have the effect of merging the one in the other. They exist as distinct subjects of property; and a conveyance of the land with its appurtenances, without mentioning the tithes, will leave the tithes in the hands of the conveying party (i). The Acts which have been passed for the commutation of tithes (k) affect tithes in the hands of laymen, as well as those possessed by the clergy. Under these Acts a rent charge, varying with the price of corn, has been substituted all over the

Conveyances
of tithes.

Descent of
tithes.

Tithes
as distinct
from
land.

Commutation
of tithes.

(g) Stat. 32 Hen. VIII. c. 7,
s. 7.

(h) *Doe d. Lushington v. Bishop
of Llandaff*, 2 New Rep. 491; 1
Eagle on Tithes, 16.

(i) *Chapman v. Gatcombe*, 2 New
Cases, 516.

(k) Stats. 6 & 7 Will. IV. c. 71;
7 Will. IV. & 1 Vict. c. 69; 1 &

2 Vict. c. 64; 2 & 3 Vict. c. 62;
3 & 4 Vict. c. 15; 5 Vict. c. 7;
5 & 6 Vict. c. 54; 9 & 10 Vict.
c. 73; 10 & 11 Vict. c. 104; 14
& 15 Vict. c. 53; 16 & 17 Vict.
c. 124; 21 & 22 Vict. c. 53; 23
& 24 Vict. c. 93; 36 & 37 Vict.
c. 42, and 41 & 42 Vict. c. 42.

Merger of
tithes or rent
charge in the
land.

for
the recovery
of a tithe
rent charge.

kingdom for the inconvenient system of taking tithes in kind : and in these Acts provision has been properly made for the *merger* of the tithes or rent charge in the land, by which the tithes or rent charge may at once be made to cease, whenever both land and tithes or rent charge belong to the same person (*l*). The payment of a tithe rent charge can only be enforced by distress and entry under the statutory powers in that behalf ; and not more than two years' arrears can be so recovered (*m*). Such arrears cannot be recovered by bringing an action for the amount due against any person ; for no one is personally liable to the payment of a tithe rent charge (*n*).

Titles of
honour.

Offices.

There are other species of incorporeal hereditaments which are scarcely worth particular notice in a work so elementary as the present, especially considering the short notice that has necessarily here been taken of the more important kinds of such property. Thus, *titles of honour*, in themselves an important kind of incorporeal hereditament, are yet, on account of their inalienable nature, of but little interest to the conveyancer. The same remark also applies to *offices* or places of business and profit. No outline can embrace every feature. Many subjects, which have here occupied but a single paragraph, are of themselves sufficient to fill a volume. Reference to the different works on the separate subjects here treated of must necessarily be made by those who are desirous of full and particular information.

(*l*) Stats. 6 & 7 Will. IV. c. 71,
s. 71 ; 1 & 2 Vict. c. 64 ; 2 & 3
Vict. c. 62, s. 1 ; 9 & 10 Vict.
c. 73, s. 19.

(*m*) See stat. 6 & 7 Will. IV.
c. 71, ss. 67, 81—85.
Sect. 67.

PART III.

OF COPYHOLDS.

OUR present subject is one peculiarly connected with those olden times of English history to which we have had occasion to make so frequent reference. Everything relating to copyholds reminds us of the baron of old, with his little territory, in which he was king. Estates in copyhold are, however, essentially distinct, both in their origin and in their nature, from those freehold estates which have hitherto occupied our attention. Copyhold lands are lands holden by *copy* of court roll; that is, the muniments of the title to such lands are *copies* of the *roll* or book in which an account is kept of the proceedings in the *Court* of the manor to which the lands belong. For all copyhold lands belong to, and are parcel of, some manor. An estate in copyhold is not a freehold: but, in construction of law, merely an estate *at the will of the lord* of the manor, at whose will copyhold estates are expressed to be holden. Copyholds are also said to be holden *according to the custom* of the manor to which they belong, for custom is the life of copyholds (*a*).

Definition of
copyholds.

Copyhold tenure grew out of tenure in villenage, as has been previously stated (*b*). The early history of tenure in villenage is lost in the obscurity which covers English institutions of early times after the settlement of the invaders from Germany (*c*). *Villenagium*, however, of which the word *villenage* is an adaptation, means

Origin of

(*a*) Co. Cop. s. 32, Tr. p. 58.

(*b*) Ante, pp. 28, 147.

(*c*) See 1 Stubbs, Const. Hist.
Chap. V.

Villanus.

A common field.

Tribal community.

Village community.

either the tenure or the condition of a *villanus* (*d*). And the word *villanus*, as originally used, merely denoted a member of a *villa*, or village agricultural community; a villager, in fact (*e*). Now, the cultivation of land upon the common or open-field system of husbandry by the members of a village community was a feature of English life, which only disappeared within the first half of the present century (*f*). But to trace the origin of this common-field system of cultivation we are carried back to the earliest stages in the history of the occupation of land. A common field, in its last stage of development, may be shortly described as a large open field of arable land, divided into long strips, which were held in severalty (*g*) by different owners. The field was cultivated in a rotation of crops determined by the rules of the community, which were founded on immemorial custom. The strips were not inclosed. And when the field lay fallow, each owner of a strip of land might put his cattle in to range over the whole field, in virtue of his right of common over the other strips (*h*). The earliest form of common-field husbandry seems to have been the common ploughing of waste land temporarily occupied by a tribal community, whose mode of life was pastoral rather than agricultural, and whose habits were migratory. The cultivation of land by a village community argues a permanent settlement upon the soil, and appears to belong to a later stage of social development (*i*). In our own island, we

(*d*) Glanvil (lib. 5) uses to denote the condition of a *serf* (*nativus*); Bracton uses *vil-lenagium* in the same sense (lib. 1, c. x, § 3, fo. 6 b), but also uses it to denote a holding in villenage, meaning either the tenure or the land held (see fo. 7, 26, 208 b).

(*e*) See Du Cange, *Glossarium*, sub verb. : Co. Litt. 5 b.

(*f*) See Williams on Commons, 84—102; Seebohm, *English Village Community*, Chap. I. sect. 4.

(*g*) Ante, pp. 129, 167.

(*h*) See ante, pp. 376, 378; Williams on Commons, 67; Seebohm, Chap. I. sects. 1—3.

(*i*) Seebohm, pp. 369, 370.

find traces of the tribal system of cultivation remaining in Wales till after the Norman Conquest (*k*). But the inhabitants of the South-Eastern parts of Britain appear to have practised the cultivation of corn on land permanently occupied in times before the Roman invasion (*l*). When land has once been placed under permanent cultivation by agricultural settlements, it is often found that the shocks of national disturbance fail to break the continuity of cultivation (*m*). In Domesday-book the *maneria*, or agricultural estates, of which an account has been given in a previous chapter (*n*), are generally described as they existed in the time of King Edward as well as at the time of the survey. And, while we remember that the village communities of Domesday had been developed through more than five centuries under Saxon institutions, we must not forget that they were spread over land which had been tilled by the agricultural settlements of the ancient Britons and their Roman conquerors. But the history of the growth of the *maneria*, which we find established in England under the last Saxon kings, is too obscure to be discussed in the pages of an elementary law book. We shall therefore take up tenure in villenage in the form which it had assumed after centuries of agriculture at the time of the Norman Conquest. As we have seen (*o*), the Domesday survey discloses a land covered with agricultural estates, each belonging to some freeholder, and cultivated in common fields by the *villani*, the inhabitants of the *villa* or *manerium* (*p*). As regards personal status, the *villanus* of the time of the Conquest appears to have been a free man (*q*): but the conditions on

Tenure in
villenage.

Seebohm, Chap. VI. ; see also Appendix C., post.

(*l*) See Seebohm, Chap. VII. s. 3.

(*m*) See Seebohm, Chap. XI. s. 2, as to local evidence of long continuity of English villages.

(*n*) Ante, pp. 146, 147.

(*o*) Ante, pp. 145—147.

(*p*) See Seebohm, Chap. III.

(*q*) *Rectitudines Singularum Personarum*, Ancient Laws and Institutes of England, pp. 185, 186; Kemble, Saxons in England,

which he held his land were servile. His holding, it will be remembered, consisted of a house and a certain number of strips of land scattered throughout the common fields of the vill (*r*). He possessed this land as the tenant of the owner of the estate, upon the condition of performing the services due in respect of his holding. These services were determined by local custom (*s*). They seem generally to have included certain payments in money and in kind: but the chief service of the *villanus* was to work for his landlord. He had to plough his landlord's demesne land, and to sow and to reap and to mow thereon, according to the time of year; and sometimes he had to do other work, as he was bid. But the amount of work which could be required from a *villanus* was regulated by custom, and seems to have varied a good deal in different places (*t*). Custom, it is thought, must also have controlled the transmission of the holding on the tenant's death (*u*).

As we have seen (*v*), in the course of two centuries after the Conquest, the constitution of the *manerium* of Domesday appears to have changed. By the time of Edward I. the *manerium* itself, the estate of the free-

* Yardland.

Vol. I. pp. 215, 323; Stubbs, Const. Hist. §§ 37, 132, Vol. I. pp. 78, 426, 2nd ed.; Seebohm, pp. 127, 165. Note that the *Inquisitio Eliensis* (survey of the lands of the monks of Ely) was taken on the oaths "*vicecomitis sciræ et omnium baronum et eorum francigenarum et totius centuriatus, presbyteri, præpositi, æt villani uniuscujusque villæ*;" Domesday, iii. 497; Seebohm, p. 83; Stubbs, Select Charters, p. 86.

(*r*) The holding of a *villanus* is very generally found to be a virgate or half a virgate of land. The Latin word *virgata* (a bundle

of rods) is used to translate the Saxon term *yardland*.* A virgate or yardland varied in extent; but, on an average, it appears to have comprised thirty acres, i.e. ten scattered acre-strips in each of the three common fields of the vill; see Seebohm, Chap. II. ss. 2—4.

(*s*) See *Reestituciones Singularum Personarum*, Ancient Laws and Institutes of England, pp. 185—189.

(*t*) See Seebohm, Chap. II. ss. 5—12; Ch. V. ss. 2, 4, 6, 7.

(*u*) See Seebohm, pp. 76, 77, 176, 177.

(*v*) Ante, pp. 147, 148, 161.

holder, has become a manor held generally by the feudal tenure of knight's service; and the most important class of tenants of the manor are not the *villani*, but the free tenants holding in socage tenure, and doing suit at the Court Baron (*x*). Tenure in villenage, with its labour-services, is now contrasted with free tenure by military service or in socage; and it appears that the tenant in villenage may be either a free man or a serf (*y*). The meaning of the word *villanus* has also been modified; and it is now used to denote either a tenant in villenage (whether free or unfree), or one who is in personal condition a serf (*z*). Bracton (*a*), writing in the time of Henry III., describes tenure in villenage as being either absolute (*purum*) or privileged. According to Bracton, the tenant in absolute villenage holds by uncertain and unlimited services; he has to do what he is bid, may be taxed at the will of the lord, and has to pay the *merchetum*, or fine for the privilege of giving his daughter in marriage. The burthen of the *merchetum* is incident to the *status* of a serf only, and not to that of a free man. But a free man may hold land in absolute villenage; and in such a case he must perform the services, if he wish to continue in the occupation of his holding. And if a free man paid the *merchetum*, he

of
in

(*x*) It is not clear how this change took place. It is thought that it may partly have resulted from grants of land out of the lord's demesne to be held by free tenure, and enfranchisement of the holdings of the *villani* (that is, granting them their holdings to be held by free services); see Bracton, lib. 1, c. xi, fo. 7; lib. 2, c. viii, § 2, fo. 26 a; lib. 4, c. xxviii, § 5, fo. 209 a; Britton, lib. 3, c. ii, §§ 7, 8, fo. 164 a; Stat. *Extenta Manerii*; Statutes of the Realm, i. p. 242; Seebohm,

Chap. III. s. 3. Compare the Domesday of St. Paul's with the Exchequer Survey of the same manors, Domesday, i. 136 a; ii. 12 b.

(*y*) Bracton, lib. 4, c. xxviii, 1, 5, fo. 207 a, 208 b.

(*z*) See Bracton, lib. 4, c. § 5, fo. 208 b, where he also used the word *servus* in speaking of the personal *status* of a serf; see also lib. 1, cc. vi, x, fo. 4 b, 6 b. Glanvil (lib. 5) calls a serf *nativus*.

(*a*) Fo. 7, 26, 208 b.

Privileged
villenage.

*Villanum
socagium.*

would pay it as an incident of his tenure, and not of his *status* (b). Privileged villenage is to hold land under an agreement with the lord at fixed services of a servile nature, which are determined by the agreement. Either a free man or a serf can hold in this way. Another kind of privileged villenage is the tenure called *villanum socagium*, which is the tenure of those who hold land of manors in the ancient demesne of the Crown (c) by fixed services of a servile nature. Such tenants can not be ejected, so long as they perform their services; nor can they be compelled to remain in the occupation of their holdings, and therefore they are called free. But they cannot alien their tenements by gift (d), or transfer them to others, any more than serfs can; and therefore, if their holdings are to be transferred, they surrender them to the lord or his steward, who delivers them to others to hold in villenage.

Growth of the
law of copy-
hold tenure.

The law of copyhold tenure seems to have grown up as the customs, which regulated the holding of land in villenage, developed into rights, and personal servitude died out. As the history of tenure in villenage goes back far beyond the Norman Conquest, it is thought that, in some places at least, the *villanus* of the time of the Domesday survey must have enjoyed practical security of tenure and the transmission of his holding by inheritance (e). Be this as it may, in Domesday the *villani* appear as *tenants* on the *manerium* of a freeholder. And ever since the law has been that the lord is the freeholder of land held of him in villenage or as copyhold. This is the starting point of the law of copyholds; which then proceeds to declare that copyholders,

Customary
freeholds.

(b) Bracton, fo. 199 b, 200 a.

(c) Ante, p. 160. This tenure seems to have given rise to the tenure called customary freehold found in manors of ancient

demesne; see next chapter.

(d) See ante, p. 174.

(e) See Pollock, *Land Laws*, App. C.

though nominally tenants *at the will* of the lord, are yet the holders of the *estates* permitted by the custom of the manor, and now secured to them as rights. In records of the time of Edward I. we find the tenants in villenage, whether free men or slaves, practically represented as the tenants at the will of the freeholder of a manor, according to the custom of the manor (*f*); and there are instances recorded of customary transmission by inheritance and alienation of a holding in villenage (*g*). Copyhold tenure seems to have gained ground

(*f*) In the Hundred Rolls of 7 Edw. I. (survey of the counties of Bedford, Buckingham, Cambridge, Huntingdon and Oxford), it is generally noted what land the lord of the manor has in his own demesne, and what land he *has* in villenage (see fo. 321, 334, 453, 603, 706); but the tenants in villenage are throughout represented as holding by *customary* services, which are usually specified in detail. In Bedford and Bucks the tenants in villenage are generally noted to hold by money rent, or work to the same value; but it is usually recorded that they are *serri* and have to pay the merchet; see fo. 321, 324, 334—349. In Cambridge the merchet is rare; the tenants in villenage generally hold by labour services, but the amount of work due by custom is specified, and often a pecuniary value is set upon it; we find tenants in villenage at rents in money, kind and work described as *customarii* (fo. 417—420, 422, 425, 427), also as *bondi* (fo. 423, 425); and we find tenants in villenage, who paid the merchet, called *customarii* (fo. 509, 510, 523, 530, 535—541), also *serri* (fo. 548. In Hunts and Oxon the tenants in villenage hold chiefly by *customary* labour services, on which a money value is often set. The merchet is very common in Hunts. In Oxon many *customarii* (see fo. 691, 714, 715) and *serri* are found, who do not pay the merchet; but we also find *villani*, *serri*, *nativi* (see fo. 823 et seq.) and *consuetudinarii* (fo. 754) who are liable to pay it.

(*g*) Hundred Rolls, fo. 403 (Cambridge)—“*Custumarii de Cestreton solebant tenere dimidiam virgatam terre, sed quidam eorundem partem terrarum suarum vendiderunt secundum usum manerii.*” Fo. 669 (Hunts, Villa de Eynesbur)—“*Roger Balle villanus tenet dimidiam virgatam terre que continet xviii acras per consuetudines subscriptas, videlicet, operabitur qualibet septimana per ii dies, scilicet, die Lunæ et die Mercurii, usque ad meridiem ad voluntatem domini, et si habeat carucam arabit qualibet die Veneris per annum usque ad meridiem vel operabitur ad voluntatem domini, et falcabit i rodum prati tempore falcationis et quando falcabit in magno prato cum convillanis habebit unum pastum et falcabit per totum diem; et dat per annum duas gallinas et ipse et convillani dant per annum ix*

with progress varying according to the customs and circumstances of particular manors and districts. Commutation of the labour services for money rents was doubtless one of the chief causes of the change from tenure in villenage to copyhold tenure; and this commutation appears to have been made at different periods in different parts of the country (*h*). The tenure came to be called copyhold, because the tenants had no other evidence of title, save copies of the Court rolls (*i*). Besides the Court Baron of a manor, in which the free tenants were both suitors and judges (*k*), the lord of a manor held a Court, afterwards called a Customary Court (*l*), for the tenants who held land of him in villenage. In this Court the lord only, or his steward, was judge (*m*). The customs relating to the holdings of the tenants in villenage were proved by the

altiles. Item si moriatur uxor ejus vel filii tenebunt terram per easdem consuetudines sine gersuma (fine) vel herietto. Habet et dicta Comitissa (the lady of the manor) in eadem villa xvii villanos quorum quilibet tenet dimidiam virgatam terre per easdem consuetudines." Thomas de Berkle and Johanna his wife held land in the same vill of the same lady by free tenure, and they had xxv *villani*, each of whom held half a virgate of land by the same customs as the *villani* of the lady of the manor. Fo. 768 (Oxon, Manor of Chalgrave)—Tenants in villenage, some of a virgate, others of half a virgate, holding by labour services, described with extreme minuteness and not in any way commuted, who had to pay the merchet and leirwite (a fine for the unchastity of a daughter). It is noted of the *villanus*, "*Item si obierit dominus habebit melius averium quod habet ad heriettum et per illum heriettum sedebit uxor ejus vidua per unum annum et unum diem et si ulterius vidua esse voluerit faciet voluntatem domini. Item heres ejus terram patris sui emere debet secundum voluntatem domini.*" See also fo. 770, 771 (Gangulvesdene). These are the only instances, which the editor has found in the Hundred Rolls, where a custom is recorded of alienation of, or hereditary succession to, a holding in villenage: but it is not to be supposed that these are the only instances where such a custom existed.

(*h*) See note (*f*) on preceding
ge.

(*i*) Litt. a. 75.

(*k*) *Anto*, pp. 148, 150.

(*l*) 2 Watkins on Copyholds, 4,
5; 1 Scriven on Copyholds, 5, 6,
3rd ed.

(*m*) Co. Litt. 58 a.

entries made in the rolls, which formed the records of the proceedings of this Court (*n*). These records are Court the Court rolls, which alone can furnish evidence of the custom, by virtue of which the copyholder claims his estate; and copies of the entries made therein were given to the tenants and kept by them as muniments of title (*o*).

Littleton, who wrote in the reign of Edward IV., describes (*p*) tenant by copy of Court roll as holding lands in fee simple, fee tail, or for life at the will of the lord, according to the custom of the manor, in virtue of an immemorial custom within that manor, that lands should be so held. He mentions the customary estates of such tenants, of which they cannot be unjustly deprived (*q*); and describes the manner in which it is customary for them to alienate their holdings (*r*). Littleton, however, also describes (*s*) tenure in villenage as being most properly when a villein holdeth of a lord, to whom he is a villein, certain lands according to the custom of the manor, or otherwise, at the will of the lord, and to do to his lord villein service, as to carry out the dung of his lord and spread it on the lord's land, and such like. And he says that some free men hold their tenements according to the custom of certain manors by such services; and their tenure is also called tenure in villenage, and yet they are not villeins; for no land holden in villenage, or villein land, nor any custom arising out of the land, shall ever make a free man villein. It appears from this passage, that in Littleton's time the word *villanus* or villein had almost entirely lost its old meaning (*t*), and was gene-

of
tenure and
villenage.

See Seebohm's account of the Court Rolls of the Manor of Windalow during the reign of Edward III.; Eng. Vill. Community, pp. 20—32.

(*o*) Co. Litt. 58 a.

(*p*) Sect. 73.

(*q*) Sects. 76, 77, 81, 82.

(*r*) Sects. 74, 78, 79.

(*s*) Sect. 172.

(*t*) See ante, pp. 404, 407.

rally used to signify a serf (*u*). It may also be inferred from Littleton's treatise that, in his time, copyhold tenure had partially, but not altogether, superseded tenure in villenage. With the extinction of personal servitude after Littleton's day (*x*), the term *tenure in villenage* seems to have become obsolete; and the tenure itself has survived only in the form of copyhold tenure.

Copyhold
estates.

The estates, for which land may be holden in copyhold tenure, and the modes of alienation thereof and succession thereto, are the outgrowth of local customs, which in many cases are doubtless of great antiquity (*y*). In these matters the law is now determined by the custom of each particular manor. In those manors, in which it was the custom that the heir of a tenant in villenage should be admitted to succeed to his ancestor's holding, the interest of the copyholders developed into customary *estates* of inheritance analogous to freehold estates. Such estates descend, not to the heirs at common law, but to the customary heirs (*z*); that is, to those relations of a deceased tenant, who by the custom of the manor have from time immemorial been admitted to succeed to his holding as his heirs. Sometimes the customary course of descent is analogous to the course of descent prescribed by law in the case of freeholds. But in many cases, quite a different course of descent

Copyholds of
inheritance.

Villeins
regardant or
in gross.

(*u*) Littleton (sects. 181—183), describes villeins as being either *regardant* or *in gross*. Villeins regardant were annexed to a manor, and would pass by a conveyance thereof; for the transfer of villeins in gross a deed was always required. It may be interesting to the student of analytical jurisprudence to note that, apparently, a villein must have been a purely incorporeal

hereditament: see ante, pp. 13, 288, 374.

(*x*) See Elton, Custom and Tenant Right, 29; Pollock, Land Laws, App. C.

(*y*) See Pollock, Land Laws, App. C.; Elton, Origins of English History, Ch. VIII.; Elton, Custom and Tenant Right, App. D.

(*z*) *Doe d. Garrod v. Garrod*, 2 B. & Ad. 87.

is prescribed by the custom of the manor (*a*). The memory of the time when the tenant's heir was admitted to succeed by virtue of a custom only, and not as of right, is preserved by the fine, which the lord is generally entitled to exact on the heir's admission (*b*). And the form of transfer by favour of the lord is also preserved in the mode of alienation of such estates; for the copyholder cannot convey his estate directly to another, but must *surrender* his holding to his lord, who will then *admit* the alienee to be his tenant at the customary services on payment of the customary fine.

In the Midland and South-Eastern counties the prevailing customs have admitted of copyhold estates of inheritance analogous to freehold estates. But in some manors within those counties, and in other parts of the country (*c*), the copyhold tenant is admitted to hold for his own life only, or for the lives of himself and another or others, or for a term of years only. In such cases, he may, by virtue of an immemorial custom, have the right either to nominate his successor, or to renew the lives or the term on payment of a certain fine: but otherwise he will have no right of renewal (*d*).

Copyholds for lives, &c.

It was long before the estates of copyholders were secured to them by clearly defined rights, which could be enforced in the King's Courts (*e*), instead of by custom. It appears from Bracton's Treatise (*f*) that

the development of copyholders' rights.

(*a*) See 2 Wat. Cop. App. III., 4th ed.; *Re Smart*, 18 Ch. D. 165.

(*b*) Cf. note (*c*) to p. 21, ante.

(*c*) Chiefly in the West of England.

(*d*) See 1 Scriv. Cop. 422 — 427, 3rd ed.; Watkins on Copyholds, 4th ed. Vol. I. pp. 62, n., 71, n., 122, n., 372—374; Vol. II. p. 214, n., and App. III.; Elton, Custom and Tenant Right, pp. 31, 32, 63—72; and App. C.

(*e*) It must be remembered that the development of the King's Court may be said to date only from the reign of Hen. II.; see Stubbs, Const. Hist. § 163, Vol. I. p. 594, 2nd ed.

(*f*) See fo. 7 a, 26 b, 168 b, 190, 197 b, 207 a, 208 b, 210 b, 273 b. It does not follow that he had no remedy in the lord's Court in Bracton's time; see fo. 7 a, 200 a.

if a tenant in villenage were ejected by any person other than his landlord, the King's Courts did not recognize that he had any right of his own to recover possession of his holding. If a tenant in absolute villenage (*g*) were ejected by his landlord, in Bracton's time he seems to have had no recognized legal right to recover possession, being regarded by the law strictly as a tenant at the will of his lord. But a tenant in privileged villenage at services fixed by agreement with the lord (*h*), seems to have acquired by the agreement a right against the lord personally, in virtue of which he might possibly recover possession, if ousted by the lord (*i*). And Bracton says that those, who held land by the tenure of *villanum socagium*, could not be ejected, as we have seen (*k*). In the reign of Edward III., however, a case occurred in which the entry of a lord on a tenant by copy of Court roll was adjudged lawful, because the tenant did not do his services, by which he broke the custom of the manor (*l*). This seems to show that the lord could not, at that time, have ejected his tenant without cause (*m*). It was laid down in the reign of Henry VI. that a tenant by copy of Court roll should have a remedy in Chancery against his lord who ousted him (*n*). And in the reign of Edward IV. the right of the copyholder to enjoy his customary estate, as against his lord, was finally established; for it was agreed a copyholder might have an action of trespass against a lord who unjustly deprived him of possession (*o*).

As against other persons than the lord, the estate of the copyholder seems to have been earlier secured to

Ante, p. 407.

(*h*) Ante, p. 408.

(*i*) See Bracton, fo. 26 b, 168 b, 208 b, 209 a, 199 b, 200 a.

(*k*) Ante, p. 408.

(*l*) Year Book, 42 Edw. III., pl. 9.

(*m*) 4 Rep. 21 b.

(*n*) Fitz. Abr. tit. Subpoena, pl. 21; see Co. Cop. s. 9; *Andrews v. Hulce*, 4 K. & J. 392.

(*o*) Year Book, 7 Edw. IV. 18, pl. 16; 21 Edw. IV. 80, pl. 27; Litt. ss. 77, 82, 84, 132.

him, as of *right*. But he was not protected by the King's writ, for he could only assert his rights in the lord's Court by proceedings in the nature of real actions according to the custom of the manor (*p*). And he could not appeal from the judgment of the lord to the King's Courts of Law; but his only remedy against the false judgment of the lord was in the nature of a petition in Chancery (*q*). Copyholders' rights were finally secured in the reign of Elizabeth, when it was decided (*r*) that a copyholder might recover possession of his holding, from his lord as well as from a stranger, in an action of ejectment, which he could bring at common law. For this action was in form founded upon a *lease* for a year made by the copyholder, which was good at common law, and the *ejectment* of the lessee after *entry* (*s*).

(*p*) See 13 Ric. II. Fitz. Abr. tit. Faux Judgment, pl. 7; Year Book, 2 Hen. IV. 12, pl. 49; 1 Hen. V. 11, pl. 24; 4 Rep. 21 b; Litt. s. 76; 1 Scriv. Cop. 562 et seq. 3rd ed. 51; 4 Rep. 30 b; *Pattishall's* 4 Vin. Abr. 385; *Edwards' Lane*, 98; *Ash v. Ragle*, 1 Vern. 367; Co. Litt. 60 a; 1 Scriv. Cop. 582, 3rd ed.

See Fitz. Abr. ubi sup.; Year Book, 14 Hen. IV. 34, pl. 26 a; see 1 Scriv. Cop. 553 et seq. 3rd ed. (*r*) *Melwich v. Luter*, 4 Rep.

(*s*) For more than two centuries before the year 1852, the usual method of trying the freehold title to land was by action of ejectment, founded upon a fictitious *lease*, and the *ouster* of the lessee after *entry* (see ante, p. 217). This action was originally the remedy of the leaseholder only (ante, p. 16), but was adopted by freeholders in order to avoid the dangers raised by the technicalities of the old real actions. Proceedings by a freeholder in ejectment became well established, the Courts obliging any person, who wished to defend such an action, to admit or *confess* the supposed lease, entry, and ouster (see Black. Comm. 200—206). Such actions were brought in the name of a fictitious plaintiff, usually styled *John Doe*, on the *demise* or lease of *John Doe*, the real claimant, who was called the lessor of the plaintiff. Copyholders' customary claims in the nature of real actions were encumbered with technicalities similar to those of the real actions at common law (see 1 Scriv. Cop. 562 et seq. 3rd ed.); so copyholders of course preferred to bring the common law action of ejectment after they were permitted to use it. The old proceedings in ejectment were abolished

Copyhold estates, then, are now rights over land, which avail against all the world and can be specifically enforced, just as much as freehold estates are; and are therefore properly included in what is called real property (*t*).

Action for the recovery of land.

by the Common Law Procedure Act, 1852, when John Doe's earthly career came to an end. That Act provided a simpler form of action of ejectment (stat. 15 & 16 Vict. c. 76, ss. 168—221), which was in use until the Judicature Acts came into operation in the year 1875. Since then the only proceeding given for trying the title to land has been termed an action for the recovery of land. This action may be brought by freeholder, copyholder, or leaseholder, to recover the *possession* of land; see Rules of the Supreme Court, 1883, Orders II. (r. 3), III. (r. 6), XII. (rr. 25—29), XVIII. (r. 2), XXI. (r. 21), XLII. (r. 5), XLVII., and Appx., A. Pt. III. s. 4, C. s. 7, H. No. 8.

(*t*) See ante, note (*c*) to p. 14.

CHAPTER I.

OF ESTATES IN COPYHOLDS.

WITH regard to the estates which may be holden in ^{Estates in} copyholds, in strict legal intendment a copyholder can have but one estate; and that is an estate at will, the ^{will.} smallest estate known to the law, being determinable at the will of either party. For though custom has now rendered copyholders independent of the will of their lords, yet all copyholds, properly so called, are still expressly stated, in the Court rolls of manors, to be holden at the will of the lord (*a*); and, more than this, estates in copyholds are still liable to some of the incidents of a mere estate at will. We have seen that, in ancient times, the law laid great stress on the feudal possession, or *seisin*, of lands, and that this possession could only be had by the holder of an estate of freehold, that is, an estate sufficiently important to be held by free tenure (*b*). Now in early times after the Conquest, the occupants of land in villenage, however much they may have been protected from disturbance by force of custom, were regarded by the law as mere tenants at the will of the freeholder of a manor, having no independent right of their own to the possession of their holdings. It was considered, therefore, that the lord alone had the right to the possession of all land occupied by his tenants in villenage (*c*). In other words, the lands held by such tenants, who afterwards came to be called copyholders, still remained part and parcel of the lord's manor; and

(*a*) 1 Watk. Cop. 44, 45; 1 151, 171, 172.
 Scriv. Cop. 605.

(*c*) See ante, pp. 408, 409, 413,

(*b*) Ante, pp. 28, 145-149, 411.

The lord is actually seised of all the copyhold lands of his manor.

The lord has a right to mines and timber.

Lease of copyholds.

the freehold of these lands still continued vested in the lord. And this is the case at the present day with regard to all copyholds. The lord of the manor is actually seised of all the lands in the possession of his copyhold tenants (*d*). He has not a mere incorporeal seignory over these as he has over his freehold tenants, or those who hold of him lands, once part of the manor, but which were anciently granted to be held for estates in fee simple by free tenure (*e*). Of all the copyholds he is the feudal possessor; and the seisin he thus has is not without its substantial advantages. The lord having a legal estate in fee simple in the copyhold lands, possesses all the rights incident to such an estate (*f*), controlled only by the custom of the manor, which is now the tenant's safeguard. Thus he possesses a right to all *mines* and *minerals* under the lands (*g*), and also to all *timber* growing on the surface, even though planted by the tenant (*h*). These rights, however, are somewhat interfered with by the rights which custom has given to the copyhold tenants; for the lord cannot come upon the lands to open his mines, or to cut his timber, without the copyholder's leave. And hence it is that timber is so seldom to be seen upon lands subject to copyhold tenure (*i*). Again, if a copyholder should grant a lease of his copyhold lands, beyond the term of a year, without his lord's consent, such a lease would be a cause of forfeiture to the lord, unless it were authorized by a special

(*d*) Watk. Descents, 51 (59, 4th ed.).

(*e*) Ante, pp. 374, 375.

(*f*) Ante, p. 103.

(*g*) 1 Watk. Cop. 333; 1 Scriv. Cop. 25, 508. See *Bowser v. Maclean*, 2 De G., F. & J. 415; *Eardley v. Grancille*, 3 Ch. Div. 826.

(*h*) 1 Watk. Cop. 332; 1 Scriv. Cop. 499.

(*i*) There is a common proverb, "The oak scorns to grow except on free land." It is certain that in Sussex and in other parts of England the boundaries of copyholds may be traced by the entire absence of trees on one side of a line, and their luxuriant growth on the other. 3rd Rep. of Real Property Commissioners, p. 15.

custom of the manor (*k*). For such an act would be imposing on the lord a tenant of his own lands, without the authority of custom; and custom alone is the life of all copyhold assurances (*l*). So a copyholder cannot commit any waste, either voluntary, by opening mines, cutting down timber or pulling down buildings, or permissive, by neglecting to repair. For the land, with all that is under it or on it, belongs to the lord: the tenant has nothing but a customary right to enjoy the occupation; and if he should in any way exceed this right, a cause of forfeiture to his lord would at once accrue (*m*).

Waste.

A peculiar species of copyhold tenure prevails in the north of England, and is to be found also in other parts of the kingdom, particularly within manors of the tenure of ancient demesne (*n*); namely, a tenure by copy of Court roll, but not expressed to be at the will of the lord. The lands held by this tenure are denominated customary freeholds. This tenure has been the subject of a great deal of learned discussion (*o*); but the Courts of law have now decided that, as to these lands, as well as to pure copyholds, the freehold is in

Customary freeholds.

(*k*) 1 Watk. Cop. 327; 1 Scriv. Cop. 544; *Doe d. Robinson v. Bousfield*, 6 Q. B. 492.

(*l*) * By the licence of his lord, a copyholder may grant a lease for any term warranted by the licence. Such a lease takes effect at common law out of the seisin of the freeholder of the manor, who cannot, therefore, authorize a longer lease than is warranted by his own estate in the manor, or some power given to him by a settlement or by statute. By the Settled Land Act, 1882 (stat. 45 & 46 Vict. c. 38, s. 14), a tenant for life under a settlement may

grant to a tenant of copyhold or customary land, parcel of a manor comprised in the settlement, a licence to make any such lease of that land, or of a specified part thereof, as the tenant for life is by this Act empowered to make of freehold land (ante, p. 35). See Williams's Conveyancing Statutes, 314—317.

* Lease of copyholds by of

(*m*) 1 Watk. Cop. 331; 1 Scriv. Cop. 526. See *Doe d. Grubb v. Earl of Burlington*, 5 Barn. & Adol. 507.

(*n*) Britt. 164 b, 166 a. See ante, pp. 160, 408.

(*o*) 2 Scriv. Cop. 665.

The freehold
is in the lord.

the lord, and not in the tenant (*p*). If a conjecture may be hazarded on so doubtful a subject, it would seem that these customary freeholds were originally held at the will of the lords, as well as those proper copyholds in which the will is still expressed as the condition of tenure (*q*); but that these tenants early acquired a right to hold their lands on performance of certain fixed services as the condition of their tenure (*r*); and the compliment now paid to the lords of other copyholds, in expressing the tenure to be at their will, was, consequently, in the case of these customary freeholds, long since dropped. That the tenants have not the fee simple in themselves appears evident from the fact, that the right to mines and timber, on the lands held by this tenure, belongs to the lord in the same manner as in other copyholds (*s*). Neither can the tenants generally grant leases without the lord's consent (*t*). The lands are, moreover, said to be *parcel* of the manors of which they are held, denoting that in law they belong, like other copyholds, to the lord of the manor, and are not merely *held of* him, like the estates of the freeholders (*u*). In law, therefore, the estates of these tenants cannot, in respect of their lords, be regarded as any other than estates at will, though this is not now actually expressed. If there should be any customary freeholds in which the above cha-

Freehold in
the tenant.

(*p*) *Stephenson v. Hill*, 3 Burr. 1273; *Doe d. Reay v. Huntington*, 4 East, 271; *Doe d. Cook v. Danvers*, 7 East, 299; *Burrell v. Dodd*, 3 Bos. & Pul. 378; *Thompson v. Hardinge*, 1 C. B. 940.

(*q*) See Bract. lib. 4, fol. 208 b, 209 a; Co. Cop. s. 32, Tr. p. 57. In *Stephenson v. Hill*, 3 Burr. 1278, Lord Mansfield says, that copyholders had acquired a permanent estate in their lands before these persons had done so. But he does not state where he

obtained his information.

(*r*) See ante, pp. 408, and n. (*c*), 414.

(*s*) *Doe d. Reay v. Huntington*, 4 East, 271, 273; *Stephenson v. Hill*, 3 Burr. 1277, *arguendo*; *Duke of Portland v. Hill*, V.-C. W., Law Rep., 2 Eq. 765.

(*t*) *Doe v. Danvers*, 7 East, 299, 301, 314.

(*u*) *Burrell v. Dodd*, 3 Bos. & Pul. 378, 381; *Doe v. Danvers*, 7 East, 320, 321.

racteristics, or most of them, do not exist, such may with good reason be regarded as the actual freehold estates of the tenants. The tenants would then possess the rights of other freeholders in fee simple, subject only to a customary mode of alienation. That such a state of things may, and in some cases does, exist, is the opinion of some very eminent lawyers (*x*). But a recurrence to first principles seems to show that the question, whether the freehold is in the lord or in the tenant, is to be answered, not by an appeal to learned *dicta* or conflicting decisions, but by ascertaining in each case whether the well-known rights of freeholders, such as to cut timber and dig mines, are vested in the lord or in the tenant.

It appears then, that with regard to the lord, a copyholder is only a tenant at will. But a copyholder, who has been admitted tenant on the Court rolls of a manor, stands, with respect to other copyholders, in a similar position to a freeholder who has the seisin. The legal estate in the copyholds is said to be *in* such a person in the same manner as the legal estate of freeholds belongs to the person who is seised. The necessary changes which are constantly occurring of the persons who from time to time are tenants on the rolls, form occasionally a source of considerable profit to the lords. For by the customs of manors, on every

Copyholders, when admitted, in a similar free-having the seisin.

(*x*) Sir Edward Coke, Co. Litt. 59 b; Co. Cop. sect. 32, Tracts, p. 58; Sir Matthew Hale, Co. Litt. 59 b, n. (1); Sir W. Blackstone, Considerations on the Question, &c.: Sir John Leach, *Bingham v. Woodgate*, 1 Russ. & Mylne, 32; 1 Tamlyn, 138. Tenements within the limits of the ancient borough of Kirby-in-Kendal, in Westmoreland, appear to be an instance; *Busher*,

app., *Thompson*, resp., 4 C. B. 48. The freehold is in the tenants, and the customary mode of conveyance has always been by deed of grant, or bargain and sale without livery of seisin, lease for a year, or inrolment. Some of the judges, however, seemed to doubt the validity of such a custom. See also *Perryman's case*, 5 Rep. 84; *Passingham*, app., *Pitty*, resp., 17 C. B. 299.

Fines.

Customary
estates analo-
gous to free-
holds.

Estate for
life.

change of tenancy, whether by death or alienation, fines of more or less amount become payable to the lord. By the customs of some manors the fine payable was anciently arbitrary; but in modern times, fines, even when arbitrary by custom, are restrained to two years' improved value of the land after deducting quit rents (*y*). Occasionally a fine is due on the change of the lord; but, in this case, the change must be by the act of God and not by any act of the party (*z*). The tenants on the rolls, when once admitted, hold customary estates analogous to the estates which may be holden in freeholds (*a*). These estates of copyholders are only *quasi* freeholds; but as nearly as the rights of the lord and the custom of each manor will allow, such estates possess the same incidents as the freehold estates of which we have already spoken. Thus there may be a copyhold estate for life; and some manors admit of no other estates, the lives being continually renewed as they drop (*b*). And in those manors in which estates of inheritance, as in fee simple and fee tail, are allowed, a grant to a man simply, without mentioning his heirs, will confer only a customary estate for his life (*c*). But as the customs of manors are very various, in some manors the words "to him and his," or "to him and his assigns," or "to him and his sequels in right," will create a customary estate in fee simple, although the word *heirs* may not be used (*d*). The 51st section of the Conveyancing and Law of Property Act, 1881 (*e*), by which estates of inheritance may be properly limited in deeds executed after the 31st December, 1881, by the words *in fee simple, in tail, in tail male, and in tail female*, appears to apply to copyholds as well as freeholds.

(*y*) 1 Scriv. Cop. 384.

(*z*) 1 Watk. Cop. 285.

(*a*) See ante, pp. 412, 413.

(*b*) See ante, p. 413.

(*c*) Co. Cop. s. 49, Tr. p. 114.

See ante, pp. 24, 175.

(*d*) 1 Watk. Cop. 109.

(*e*) Stat. 44 & 45 Vict. c. 41, ante, p.

OF ESTATES IN COPYHOLDS.

It will be remembered that, anciently, if a grant had been made of freehold lands to B. simply, without mentioning his heirs, during the life of A., and B. had died first, the first person who entered after the decease of B. might lawfully hold the lands during the residue of the life of A. (*f*). And this general occupancy was abolished by the Statute of Frauds. But copyhold lands were never subject to any such law (*g*). For the seisin or feudal possession of all such lands belongs, as we have seen (*h*), to the lord of the manor, subject to the customary rights of occupation belonging to his tenants. In the case of copyholds, therefore, the lord of the manor after the decease of B. would, until lately, have been entitled to hold the lands during the residue of A.'s life; and the Statute of Frauds had no application to such a case (*i*). But now, by the Act for the amendment of the laws with respect to wills (*k*), the testamentary power is extended to copyhold or customary estates *pur autre vie* (*l*); and the same provision, as to the application of the estate by the executors or administrators of the grantee, as is contained with reference to freeholds (*m*), is extended also to customary and copyhold estates (*n*). The grant of an estate *pur autre vie*, in copyholds, may, however, be extended, by express words, to the heirs of the grantee (*o*). And in this event the heir will, in case of intestacy, be entitled to hold during the residue of the life of the *cestui que vie*, subject to the debts of his ancestor the grantee (*p*).

- | | |
|--|---|
| (<i>f</i>) Ante, p. 26. | (<i>l</i>) Sect. 3. |
| (<i>g</i>) <i>Doe d. Foster v. Scott</i> , 4 Barn. & Cres. 706; 7 Dow. & Ryl. 190. | (<i>m</i>) Ante, p. 27. |
| (<i>h</i>) Ante, p. 418. | (<i>n</i>) Sect. 6. |
| (<i>i</i>) 1 Scriv. Cop. 63, 108; 1 Watk. Cop. 302. | (<i>o</i>) 1 Scriv. Cop. 64; 1 Watk. Cop. 303. |
| (<i>k</i>) Stat. 7 Will. IV. & 1 Vict. c. 26. | (<i>p</i>) Stat. 7 Will. IV. & 1 Vict. c. 26, s. 6. |

Estate tail in
copyholds.

An estate tail in copyholds stands upon a peculiar footing, and has a history of its own, which we shall now endeavour to give (*q*). This estate, it will be remembered, is an estate given to a man and the heirs of his body. With regard to freeholds, we have seen (*r*) that an estate given to a man and the heirs of his body was, like all other estates, at first inalienable; so that no act which the tenant could do could bar his issue, or expectant heirs, of their inheritance. But, in an early period of our history, a right of alienation appears gradually to have grown up, empowering every freeholder to whose estate there was an expectant heir to disinherit such heir, by gift or sale of the lands. A man, to whom lands had been granted to hold to him and the heirs of his body, was accordingly enabled to alien the moment a child or expectant heir of his body was born to him; and this right of alienation at last extended to the possibility of reverter belonging to the lord, as well as to the expectancy of the heir (*s*); till at length it was so well established as to require an Act of Parliament for its abolition. The Statute *De donis* (*t*) accordingly restrained all alienation by tenants of lands which had been granted to themselves and the heirs of their bodies; so that the lands might not fail to descend to their issue after their death, or to revert to the donors or their heirs if issue should fail. This statute was passed avowedly to restrain that right of alienation, of the prior existence of which the statute itself is the best proof. And this right, in respect of fee simple estates, was soon afterwards acknowledged and confirmed by the

The Statute
De donis.

(*q*) The attempt here made to explain the subject is grounded on the authorities and reasoning of Mr. Serj. Scriven. (1 Scriv. Cop. 67 et seq.) Mr. Watkins sets out with right principles, but

seems strangely to stumble on the wrong conclusion. (1 Watk. Cop. chap. 4.)

(*r*) Ante, p. 58 et seq.

(*s*) Ante, p. 64.

(*t*) 13 Edw. I. c. 1; ante, p. 65.

Statute of *Quia emptores* (*u*). But during all this period, tenants in villenage were in a very different state from the freeholders, who were the objects of the above statutes (*x*). Tenants in villenage were generally bound to labour on their lord's demesne, as the condition of remaining in the occupation of their holdings; and they were often in a state of personal servitude (*y*). Copyhold estates, however customary, were not fully recognized as rights, when the right of alienation was established in the case of freeholds (*z*). The right of an ancestor to bind his heir (*a*), with which right, as we have seen (*b*), the power to alienate freeholds commenced, never belonged to a copyholder (*c*). And, until the year 1833, copyhold lands in fee simple descended to the customary heir, quite unaffected by any bond debts of his ancestor by which the heir of his freehold estates might have been bound (*d*). It would be absurd, therefore, to suppose that the right of alienation of copyhold estates arose in connexion with the right of freeholders. The two classes were then quite distinct. The one were poor and neglected, the other powerful and consequently protected (*e*). The one were considered to hold their tenements at the will of their lords; the other main-

Tenants in
...

state from
freeholders.

(*u*) 18 Edw. I. c. 1.

(*x*) See ante, pp. 147, 148, 151, 405—407. In the preamble of the Statute *De donis*, the tenants are spoken of as *feoffees*, and as able by deed and *feoffment* to bar their donors, showing that freeholders only were intended. And in the statute of *Quia emptores* freemen are expressly mentioned.

(*y*) See ante, pp. 405—409, and notes (*f*), (*g*), to p. 409.

(*z*) See ante, pp. 413—415.

(*a*) Ante, p. 103.

(*b*) Ante, pp. 59—62.

(*c*) *Eyles v. Lane and Pers*, Cro. Eliz. 380.

(*d*) 4 Rep. 22 a.

(*e*) The famous provision of Magna Charta, c. 29,—“Nullus liber homo capiatur vel imprisonetur aut dissesiatur de aliquo libero tenemento suo, &c., nisi per legale iudicium parium suorum vel per legem terre. Nulli vendemus, nulli negabimus, aut differemus rectum vel justiciam,”—whatever classes of persons it may have been subsequently construed to include—plainly points to a distinction then existing between free and not free. Why else should the word *liber* have been used at all?

tained a right of alienation in spite of them. The one had no other security than was afforded by the force of local custom; the other could appeal to the laws of the realm.

Now, with regard to an estate given to a copyholder and the heirs of his body, the lords of different manors appear to have acted differently,—some of them permitting alienation on issue being born, and others forbidding it altogether. And from this difference appears to have arisen the division of manors, in regard to estates tail, into two classes, namely, those in which there is no custom to entail, and those in which such a custom exists.

As to manors where there is no custom to entail.

Alienation

In manors in which there is no custom to entail, a gift of copyholds, to a man and the heirs of his body, will give him an estate analogous to the fee simple conditional which a freeholder would have acquired under such a gift before the passing of the Statute *De donis* (*f*). Before he has issue, he will not be able to alien; but after issue are born to him, he may alienate at his pleasure (*g*). In this case the right of alienation appears to be of a very ancient origin, having arisen from the liberality of the lord in permitting his tenants to stand on the same footing in this respect as freeholders then stood.

When alienation was not allowed.

A custom to entail was established.

But, as to those manors in which the alienation of the estate in question was not allowed, the history appears somewhat different. The estate, being inalienable, descended, of course, from father to son, according to the customary line of descent. A perpetual entail was thus set up, and a custom to entail established in the manor. But in process of time the original strictness of the lord defeated his own end. For, the evils

(*f*) Ante, pp. 59, 64; *Dec d. Bleard v. Simpson*, 4 New Cases, 333; 3 Man. & Gran. 929.

(*g*) *Dec d. Spencer v. Clark*, 5 Barn. & Ald. 458.

of such an entail, which had been felt as to freeholds, after the passing of the Statute *De donis* (*h*), became felt also as to copyholds (*i*). And, as the copyholder advanced in importance, different devices were resorted to for the purpose of effecting a bar to the entail; and, in different manors, different means were held sufficient for this purpose. In some, a customary recovery was suffered, in analogy to the common recovery, by which an entail of freeholds had been cut off (*k*). In others, the same effect was produced by a preconcerted forfeiture of the lands by the tenant, followed by a re-grant from the lord of an estate in fee simple. And in others, a conveyance by surrender, the ordinary means, became sufficient for the purpose; and the presumption was, that a surrender would bar the estate tail until a contrary custom was shown (*l*). Thus it happened that in all manors, in which there existed a custom to entail, a right grew up, empowering the tenant in tail, by some means or other, at once to alienate the lands. He thus ultimately became placed in a better position than the tenant to him and the heirs of his body in a manor where alienation was originally permitted. For, such a tenant can now only alienate after he has had issue. But a tenant in tail, where the custom to entail exists, need not wait for any issue, but may at once destroy the fetters by which his estate has been attempted to be bound.

The beneficial enactment before referred to (*m*), by which fines and common recoveries of freeholds were abolished, also contains provisions applicable to entails of copyholds. Instead of the cumbrous machinery of a customary recovery or a forfeiture and re-grant, it substitutes, in every case, a simple conveyance by surren-

Customary

Forfeiture
andEntails now
known as

(*h*) Ante, p. 66.

(*i*) 1 Scriv. Cop. 70.

(*k*) Ante, p. 68.

(*l*) *Goold v. White*, Kay, 682.

(*m*) Stat. 3 & 4 Will. IV. c. 74;
ante, p. 70.

der (*n*), the ordinary means for conveying a customary estate in fee simple. When the estate tail is in remainder, the necessary consent of the protector (*o*) may be given, either by deed, to be entered on the Court rolls of the manor (*p*), or by the concurrence of the protector in the surrender, in which case the memorandum or entry of the surrender must expressly state that such consent has been given (*q*).

Estate in fee simple.

Debts.

Crown debts.

Judgment debts.

The same free and ample power of alienation, which belongs to an estate in fee simple in freehold lands, appertains also to the like estate in copyholds. The liberty of alienation *inter vivos* appears, as to copyholds, to have had little, if any, precedence, in point of time, over the liberty of alienation by will. Both were, no doubt, at first an indulgence, which subsequently ripened into a right. And these rights of voluntary alienation long outstripped the liability to involuntary alienation for the payment of the debts of the tenants; for, till the year 1833, copyhold lands of deceased debtors were under no liability to their creditors, even where the heirs of the debtor were expressly bound (*r*). And the Crown had no further privilege than any other creditor. But now, all estates in fee simple, whether freehold, customary or copyhold, are rendered liable to the payment of all the just debts of the deceased tenant (*s*). Creditors who had obtained judgments against their debtors were also, till the year 1838, unable to take any part of the copyhold lands of their debtors under the writ of *elegit* (*t*). But the Act, by which the remedies of judgment creditors were extended (*u*), enables the sheriff,

(*n*) Sect. 50.

(*o*) See ante, p. 74.

(*p*) Sect. 51.

(*q*) Sect. 52.

(*r*) 4 Rep. 22 a; 1 Watk. Copyholds, 140.

(*s*) Stat. 3 & 4 Will. IV. c. 104.

(*t*) See ante, p. 108; 1 Scriv.

Copyholds, 60.

(*u*) Stat. 1 & 2 Vict. c. 110,

s. 11.

under the writ of *elegit*, to deliver execution of copyhold or customary, as well as of freehold, lands; and purchasers of copyholds thus became bound by all judgments which had been entered up against their vendors. But if any purchaser should have had no notice of any judgment, it would seem that he was protected by the clause in a subsequent Act (*x*), which provided, that, as to purchasers without notice, no judgment should bind any lands otherwise than it would have bound such purchasers under the old law. By a later Act, even if the purchaser had notice of a judgment, he was not bound unless a writ of execution on the judgment should have been issued and registered before the execution of his conveyance and the payment of his purchase-money; nor even then unless the execution should have been put in force within three calendar months from the time when it was registered (*y*). And now, as we have seen, the lien of all judgments of a date subsequent to the 29th of July, 1864, has been abolished altogether (*z*).

Copyholds are equally liable, with freeholds, to involuntary alienation on the bankruptcy of the tenant. The trustee for the creditors has now power to deal with any property of every description to which the bankrupt is beneficially entitled as tenant in tail, in the same manner as the bankrupt might have dealt with the same (*a*). And the Bankruptcy Act, 1883, provides that where any part of the property of the bankrupt is of copyhold or customary tenure, or is any like property passing by surrender and admittance or in any similar manner, the trustee shall not be compellable to

Bankruptcy.

Estates tail.

Trustee for creditors need not be admitted.

(*x*) Stat. 2 & 3 Vict. c. 11, s. 5; ante, p. 111.

(*y*) Stat. 23 & 24 Vict. c. 38, s. 1; ante, p. 112.

(*z*) Stat. 27 & 28 Vict. c. 112; ante, p. 112.

(*a*) Stat. 46 & 47 Vict. c. 52, s. 56 (5), which embodies stat. 3 & 4 Will. IV. c. 74, ss. 56—73.

be admitted to the property, but may deal with the same in the same manner as if it had been capable of being and had been duly surrendered or otherwise conveyed to such uses as the trustee may appoint; and any appointee of the trustee shall be admitted or otherwise invested with the property accordingly (*b*).

Descent of an estate in fee simple in copyholds.

The descent of an estate in fee simple in copyholds is governed by the custom of descent which may happen to prevail in the manor; but, subject to any such custom, the provisions contained in the Act for the amendment of the law of inheritance (*c*) apply to copyhold as well as freehold hereditaments, whatever be the customary course of their descent (*d*). As, in the case of freeholds, the lands of a person dying intestate descend at once to his heir (*e*), so the heir of a copyholder becomes, immediately on the decease of his ancestor, tenant of the lands, and may exercise any act of ownership before the ceremony of his admittance has taken place (*f*). But as between himself and the lord, he is not completely a tenant till he has been admitted.

Tenure.

Fealty.

Suit of Court.

Escheat.

The tenure of an estate in fee simple in copyholds involves, like the tenure of freeholds, an oath of fealty from the tenant (*g*), together with suit to the customary Court of the manor. Escheat to the lord on failure of heirs is also an incident of copyhold tenure. And before the abolition of forfeiture for treason and felony (*h*) the lord of a copyholder had the advantage over the

(*b*) Stat. 46 & 47 Vict. c. 52, s. 50, sub-s. 4. The former enactments relating to this subject were stats. 12 & 13 Vict. c. 106, s. 209; 24 & 25 Vict. c. 134, s. 114; and 32 & 33 Vict. c. 71, s. 22.

(*c*) Stat. 3 & 4 Will. IV. c. 106. See *Re Smart*, 18 Ch. D. 165.

(*e*) Ante, p. 122.

(*f*) 1 Scriv. Cop. 357; *Right d. Taylor v. Banks*, 3 Bar. & Ad. 664; *King v. Turner*, 1 My. & K. 456; *Dec d. Perry v. Wilson*, 5 Ad. & Ell. 321.

(*g*) 2 Scriv. Cop. 732.

(*h*) See ante, pp. 80, 156 et seq.

lord of a freeholder in this respect, that, whilst freehold lands in fee simple were forfeited to the Crown by the treason of the tenant, the copyholds of a traitor escheated to the lord of the manor of which they were held (*i*). Rents (*k*) also of small amount are not unfrequent incidents of the tenure of copyhold estates. And reliefs (*l*) may, by special custom, be payable by the heir (*m*). The other incidents of copyhold tenure depend on the customs of each particular manor; for this tenure, as we have seen (*n*), escaped the destruction in which the tenures of all freehold lands (except free and common socage, and frankalmoign) were involved by the Act of 12 Car. II. c. 24. Rent
Relief.

A curious incident to be met with in the tenure of some copyhold estates is the right of the lord, on the death of a tenant, to seize the tenant's best beast, or other chattel, under the name of a heriot (*o*). Heriots were English institutions before the Norman Conquest. The heriot, properly so called, was a tribute of war-horses, weapons and armour, varying in quantity according to the degree, which became due to the king on the death of an eorl or a thegn (*p*). Its origin is traced to the horse and arms with which the German *princeps* supplied each of his *comites*, and which reverted to him on the death of the *comes* (*q*). When the law of feudal tenure by military service had grown up in

(*i*) *Lord Cornwallis's case*, 2 Vent. 38; 1 Watk. Cop. 340; 1 Scriv. Cop. 552.

(*k*) Ante, p. 154; see note (*o*) thereto. Rent incident to copyhold tenure may be redeemed under stat. 44 & 45 Vict. c. 41, s. 45; see Williams's Conveyancing Statutes, 217, 218.

(*l*) Ante, pp. 22, n., 149, 152, 154.

(*m*) 1 Scriv. Cop. 436.

(*n*) Ante, p. 153.

(*o*) 1 Scriv. Cop. 437 et seq., 3rd ed.

(*p*) Kemble, Saxons in England, Vol. I. p. 178; Vol. II. p. 98; 1 Stubbs, Const. Hist. 200, note, 2nd ed. See Stubbs, Select Charters, 74, 91.

(*q*) Tacitus, Germania, c. 14; see Maine, Early Law and Custom, pp. 346—348; 1 Stubbs, Const. Hist. 24, 2nd ed.

England after the Norman Conquest, these heriots were generally superseded by reliefs (*r*), and so became obsolete. The heriots, which are now connected with copyhold tenure, have a different origin. Before the Norman Conquest, it appears to have been the custom in many places that the freeholder of land, who took a man to work on his demesne as his tenant in villenage, should furnish him with oxen, a cow, sheep and implements of husbandry, as his farming outfit. These remained the property of the freeholder, and reverted to him on the tenant's death (*s*); but were usually transferred to the new tenant along with the holding. As time went on, it became an established custom that the tenant's heir should succeed to his deceased ancestor's holding, and that the landlord should not take into his own hands all the deceased tenant's cattle and stock, but should only take the best beast or some other chattel. The chattel, which the lord was accustomed to take for himself on the death of his tenant in villenage, seems to have acquired the name of heriot, by analogy to the heriot properly so called (*t*). And to the taking of this so-called *heriot*, the lord's right in the tenant's chattels was at last restricted (*u*). In this way the heriot became an incident of tenure in villenage (*x*), and it remained an incident of copyhold tenure (*y*). The right of the lord is now confined to

(*r*) 1 Stubbs, Const. Hist. § 96, p. 261, 2nd ed.; Freeman, Norman Conquest, Vol. V. pp. 379, 867.

(*s*) See *Rectitudines Singularum Personarum*, Ancient Laws and Institutes of England, 186; Seebohm, English Village Community, 132, 138, see also p. 61.

(*t*) Kemble, Saxons in England, Vol. I. p. 178; Vol. II. p. 98.

(*u*) See Laws of Cnut, c. 71;

Stubbs, Select Charters, p. 74, 2nd ed.; Glanvil, lib. 7, c. v; Bracton, fo. 60, 86 a; Britton, lib. 3, c. v, § 5, fo. 178; Fleta, lib. 2, c. lvii.

(*x*) See note (*g*) to p. 409, ante.

(*y*) Sometimes a heriot is due on the death of a freeholding tenant of a manor, either as rent service, or by virtue of an immemorial custom. * Heriot service is when a heriot has been reserved as an incident of the tenure of an

such a chattel as the custom of the manor, grown into a law, will enable him to take (*z*). The kind of chattel which may be taken for a heriot varies in different manors. And in some cases the heriot consists merely of a money payment.

All kinds of estates in copyholds, as well as in free-
holds, may be held in joint tenancy or in common; and an illustration of the unity of a joint tenancy occurs in the fact, that the admission, on the court rolls of a manor, of one joint tenant, is the admission of all his companions; and on the decease of any of them the survivors or survivor, as they take no new estate, require no new admittance (*a*). The jurisdiction of the Court of Chancery in enforcing partitions between joint tenants and tenants in common did not formerly extend to copyhold lands (*b*). But by the Copyhold Act of 1841 (*c*) this jurisdiction was extended to the partition of copyholds as well as freeholds.

Joint
and in
mon.

The rights of lords of manors to fines and heriots, rents, reliefs and customary services, together with the lord's interests in the timber growing on copyhold lands,

Act for com-
mutati-
certain
rial rights

estate in fee simple granted in free tenure before stat. 18 Edw. I. c. 1. Such a reservation would seem to point to the grant of an estate of freehold upon the enfranchisement of a holding in villenage. When a heriot is due from a freeholder by custom called *heriot custom, the fact also seems to point to a heriot, yielded by a former tenant in villenage, which has remained the lord's customary due after the enfranchisement of the holding. See ante, pp. 148, 151, 405—407, and note (*x*) to p. 407; 1 Scriv. Cop. 437 et seq., 3rd ed.; Williams on Seisin, App.

A. By the custom of the manor of South Tawton, otherwise Itton, in the county of Devon, heriots are still due from the freeholders of the manor; *Damerell v. theron*, 10 Q. B. 20; and in St. and some parts of Surrey from freeholders are not unfre-
quent. See *Lord Zouch v. Dal-*
biac, L. R., 10 Ex. 172.

* Heriot
custom.

z: 2 Watk. Cop. 129.

(*a*): 1 Watk. Cop. 272, 277.

(*b*). *Jope v. Morshead*, 6 Beav. 213.

(*c*). Stat. 4 & 5 Vict. c. 35, s. 85. See also stat. 13 & 14 Vict. c. 60, s. 30.

ment.

have been found productive of considerable inconvenience to copyhold tenants, without any sufficient corresponding advantage to the lords. An Act of Parliament (*d*) was accordingly passed in the year 1841, by which the commutation of these rights and interests, together with the lord's rights in mines and minerals, if expressly agreed on, has been greatly facilitated. The machinery of the Act is, in many respects, similar to that by which the commutation of tithes was effected. The rights and interests of the lord are changed, by the commutation, into a rent charge varying or not, as may be agreed on, with the price of corn, together with a small fixed fine on death or alienation, in no case exceeding the sum of five shillings (*e*). By the same Act facilities were also afforded for the enfranchisement of copyhold lands, or the conveyance of the freehold of such lands from the lord to the tenant, whereby the copyhold tenure, with all its incidents, is for ever destroyed. The enfranchisement of copyholds was authorized to be made, either in consideration of money to be paid to the lord, or of an annual rent charge, varying with the price of corn, issuing out of the lands enfranchised, or in consideration of the conveyance of other lands (*f*). Provision was also made for charging the money, paid for enfranchisement, on the lands enfranchised, by way of mortgage (*g*). The principal object of these enactments was to provide for the case of the

Stat. 4 & 5 Vict. c. 35; amended by stat. 6 & 7 Vict. c. 23, further amended and explained by stat. 7 & 8 Vict. c. 55, continued by stat. 14 & 15 Vict. c. 53, extended by stat. 15 & 16 Vict. c. 51, amended by stat. 21 & 22 Vict. c. 94, continued by stats. 21 & 22 Vict. c. 53; 23 & 24 Vict. c. 81; 25 & 26 Vict. c. 73, and 30 & 31 Vict. c. 143; amended by stat.

31 & 32 Vict. c. 89; and last continued by stat. 47 & 48 Vict. c. 53.

(*e*) Stats. 4 & 5 Vict. c. 35, s. 14; 15 & 16 Vict. c. 51, s. 41.

(*f*) Stats. 4 & 5 Vict. c. 35, ss. 56, 59, 73, 74, 75; 6 & 7 Vict. c. 23; 7 & 8 Vict. c. 55, s. 5.

(*g*) Stats. 4 & 5 Vict. c. 35, ss. 70, 71, 72; 7 & 8 Vict. c. 55, s. 4.

lands being in settlement, or vested in parties not otherwise capable of at once entering into a complete arrangement; but no provision was made for compulsory enfranchisement. Subsequently, however, Acts were passed to make the enfranchisement of copyholds compulsory at the instance either of the tenant or of the lord (*h*). If the enfranchisement be made at the instance of the tenant, the compensation is to be a gross sum of money, to be paid at the time of the completion of the enfranchisement, or to be charged on the land by way of mortgage; and where the enfranchisement is effected at the instance of the lord, the compensation is to be an annual rent charge, to be issuing out of the lands enfranchised; subject to the right of the parties, with the sanction of the commissioners appointed under the Act (now called the Land Commissioners (*i*)), to agree that the compensation shall be either a gross sum or a yearly rent charge, or a conveyance of land to be settled to the same uses as the manor is settled (*k*). It is also provided that in any enfranchisement to be hereafter effected under the before-mentioned Act, it shall not be imperative to make the enfranchisement rent charge variable with the prices of grain; but the same may, at the option of the parties or at the discretion of the commissioners, as the case may require, be fixed in money or be made variable as aforesaid (*l*). Enfranchisements under these Acts are irrespective of the validity of the lord's title (*m*). By the Copyhold Act, 1858, an award of enfranchisement, confirmed by

(*h*) Stat. 15 & 16 Vict. c. 51, amended by stat. 21 & 22 Vict. c. 94.

(*i*) Stat. 45 & 46 Vict. c. 38, s. 48; see Williams's Conveyancing Statutes, 348—350.

(*k*) Stat. 15 & 16 Vict. c. 51, s. 7; 21 & 22 Vict. c. 94, s. 21.

Lingwood v. Gyde, L. R., 2

C. P. 72; *Arden v. Wilson*, L. R., 7 C. P. 535.

(*l*) Stat. 15 & 16 Vict. c. 51, s. 41. See also stat. 21 & 22 Vict. c. 94, s. 11.

(*m*) *Kerr v. Pawson*, Rolls, 4 Jur., N. S. 425; *S. C.* 35 Beav. 394.

Heriots.

Saving of
curtesy,
dower and
freebench,
and of com-
monable
rights.

Mines and
minerals.

ment by
agreement.

By tenant for
life.

the commissioners, has been substituted for the deed of enfranchisement required by the Act of 1852 (*n*). The Acts also provide for the extinguishment of heriots due by custom from tenants of freeholds and customary freeholds (*o*). But the curtesy, dower or freebench of persons married before the enfranchisement shall have been completed, is expressly saved (*p*): and all the commonable rights of the tenant continue attached to his lands, notwithstanding the same shall have become freehold (*q*). And no enfranchisement under these Acts is to affect the estate or rights of any lord or tenant in any mines or minerals within or under the lands enfranchised or any other lands, unless with the express consent in writing of such lord or tenant (*r*). And nothing therein contained is to interfere with any enfranchisement which may be made irrespective of the Acts, where the parties competent to do so shall agree on such enfranchisement (*s*). Where all parties are *sui juris* and agree to an enfranchisement, it may at any time be made by a simple conveyance of the fee simple from the lord to his tenant (*t*). And under the Settled Land Act, 1882 (*u*), the tenant for life of a manor may sell and convey the freehold and inheritance of any copyhold or customary land, parcel of the manor, either with or without the mines and minerals thereunder, so as to effect an enfranchisement.

(*n*) Stat. 21 & 22 Vict. c. 94, s. 10.

(*o*) Stat. 21 & 22 Vict. c. 94, s. 7, repealing stat. 15 & 16 Vict. c. 51, s. 27.

(*p*) Stats. 4 & 5 Vict. c. 35, s. 79; 15 & 16 Vict. c. 51, s. 34.

(*q*) Stats. 4 & 5 Vict. c. 35, s. 81; 15 & 16 Vict. c. 51, s. 45.

(*r*) Stat. 15 & 16 Vict. c. 51,

s. 48. See also stat. 21 & 22 Vict. c. 94, s. 14.

(*s*) Stat. 15 & 16 Vict. c. 51, s. 55.

(*t*) 1 Watk. Cop. 362; 1 Scriv. Cop. 653.

(*u*) Stat. 45 & 46 Vict. c. 38, ss. 3, 20; see Williams's Conveyancing Statutes, 295, 296, 321.

CHAPTER II.

OF THE ALIENATION OF COPYHOLDS.

THE mode in which the alienation of copyholds is at present effected, so far at least as relates to transactions *inter vivos*, still retains much of the simplicity, as well as the inconvenience, of the original method in which the alienation of these lands was first allowed to take place. The copyholder surrenders the lands into the hands of his lord, who thereupon admits the alienee. For the purpose of effecting these admissions, and of informing the lord of the different events happening within his manor, as well as for settling disputes, it was formerly necessary that his Customary Court, to which all the copyholders were suitors, should from time to time be held. At this Court, the copyholders present were called the homage, on account of the ceremony of *homage* which they were all anciently bound to perform to their lord (*a*). In order to form a Court, it was formerly necessary that two copyholders at least should be present (*b*). But, in modern times, the holding of Courts having degenerated into little more than an inconvenient formality, it has been provided by the Copyhold Act of 1841, that Customary Courts may be holden without the presence of any copyholder; but no proclamation made at any such Courts is to affect the title or interest of any person not present, unless notice thereof shall be duly served on him within one month (*c*): and it is also provided, that where, by

Customary Court.

Homage.

Courts may now be holden without the presence of any copyholder.

(*a*) Ante, p. 149.(*c*) Stat. 4 & 5 Vict. c. 35, s. 86.(*b*) 1 Scriv. Cop. 289.

the custom of any manor, the lord is authorized, with the consent of the homage, to grant any common or waste lands of the manor, the Court must be duly summoned and holden as before the Act (*d*). No Court can lawfully be held out of the manor; but by immemorial custom, Courts for several manors may be held together within one of them (*e*). In order that the transactions at the Customary Court may be preserved, a book is provided, in which a correct account of all the proceedings is entered by a person duly authorized. This book, or a series of them, forms the court rolls of the manor. The person who makes the entries is the steward; and the court rolls are kept by him, but subject to the right of the tenants to inspect them (*f*). This officer also usually presides at the Court of the manor.

Court rolls.
Steward.

Grants. Before adverting to alienation by surrender and admittance, it will be proper to mention, that, whenever any lands, which have been demisable time out of mind by copy of court roll, fall into the hands of the lord, he is at liberty to grant them to be held by copy at his will, according to the custom of the manor, under the usual services (*g*). These grants may be made by the lord for the time being, whatever be the extent of his interest (*h*), so only that it be lawful: for instance, by a tenant for a term of life or years. But if the lord, instead of granting the lands by copy, should once make any conveyance of them at the common law, though it were only a lease for years, his power to grant by copy would for ever be destroyed (*i*). The steward, or his deputy, if duly authorized so to

(*d*) Stat. 4 & 5 Vict. c. 35,
s. 91.

(*e*) 1 Scriv. Cop. 6.

(*f*) Ibid. 587, 588.

(*g*) 1 Watk. Cop. 23; 1 Scriv.
Cop. 111.

(*h*) *Doe d. Rayer v.*

2 Q. B. 792.

(*i*) 1 Watk. Cop. 37.

do, may also make grants, as well as the lord, whose servant he is (*j*). It was formerly doubtful whether the steward or his deputy could make grants of copyholds when out of the manor (*k*). But by the Copyhold Act of 1841 (*l*), it is provided that the lord of any manor, or the steward, or deputy steward, may grant at any time, and at any place, either within or out of the manor, any lands parcel of the manor, to be held by copy of court roll, or according to the custom of the manor, which such lord shall for the time being be authorized and empowered to grant out to be held as aforesaid; so that such lands be granted for such estate, and to such person only, as the lord, steward, or deputy shall be authorized or empowered to grant the same.

Grants may now be made out of the manor.

When a copyholder is desirous of disposing of his lands, the usual method of alienation is by surrender of the lands into the hands of the lord (usually through the medium of his steward), to the use of the alienee and his heirs, or for any other customary estate which it may be wished to bestow. This surrender generally takes place by the symbolical delivery of a rod, by the tenant to the steward. It may be made either in or out of Court. If made in Court, it is of course entered on the court rolls, together with the other proceedings; and a copy of so much of the roll as relates to such surrender is made by the steward, signed by him, and stamped like a purchase deed; it is then given to the purchaser as a muniment of his title (*m*). If the surrender should be made out of Court, a memorandum of the transaction, signed by the parties and the steward, is made, in writing, and duly stamped as before (*n*).

Alienation by surrender.

In Court.

Out of Court.

(*j*) 1 Watk. Cop. 29.

(*k*) Ibid. 30.

(*l*) Stat. 4 & 5 Vict. c. 35, s. 87.

(*m*) A form of such a copy of

court roll will be found in Appendix (G).

(*n*) By the Stamp Act, 1870, the stamp duty on a memorandum of a surrender if made out of

Presentment, In order to give effect to a surrender made out of Court, it was formerly necessary that due mention, or *presentment*, of the transaction, should be made by the suitors or homage assembled at the next, or, by special custom, at some other subsequent Court (*o*). And in this manner an entry of the surrender appeared on the court rolls, the steward entering the presentment as part of the business of the Court. But by the Copyhold Act of 1841, it is provided that surrenders, copies of which may be delivered to the lord, his steward, or deputy steward, shall be forthwith entered on the court rolls; which entry is to be deemed to be an entry made in pursuance of a presentment by the homage (*p*). So that in this case, the ceremony of presentment is now dispensed with. When the surrender has been made, the surrenderor still continues tenant to the lord, until the admittance of the surrenderee. The surrenderee acquires by the surrender merely an inchoate right, to be perfected by admittance (*q*). This right was formerly inalienable at law, even by will, until rendered devisable by the new statute for the amendment of the laws with respect to wills (*r*); but, like a possibility in the case of freeholds, it may always be released, by deed, to the tenant of the lands (*s*).

now unneces-
sary.

Nature of
surrenderee's
right until
admittance.

Surrender to
the use of a
wife.

A surrender of copyholds might always be made by a man to the use of his wife, for such a surrender is not a direct conveyance, but operates only through the instru-

Court, or on the copy of court roll, if made in Court, is the same as on the sale or mortgage of a freehold estate; but if not made on a sale or mortgage, the duty is 10s. Stat. 33 & 34 Vict. c. 97, sched. tit. Copyhold and Customary Estates.

(*o*) 1 Watk. Cop. 79; 1 Scriv. Cop. 277.

(*p*) Stat. 4 & 5 Vict. c. 35, s. 89.

(*q*) *Doe d. Tofield v. Tofield*, 11 East, 246; *Rex v. Dame Jane St. John Mildmay*, 5 B. & Ad. 254; *Doe d. Winder v. Lawes*, 7 Ad. & E. 195.

(*r*) 7 Will. IV. & 1 Vict. c. 26, s. 3.

(*s*) *Kite and Queinton's case*, 4 Rep. 25 a; Co. Litt. 60 a.

mentality of the lord (*t*). And a valid surrender might at any time be made of the lands of a married woman, by her husband and herself; she being on such surrender separately examined, as to her free consent, by the steward or his deputy (*u*). The Vendor and Purchaser Act, 1874 (*x*), provides (*y*) that where any copyhold hereditament shall be vested in a married woman, as a bare trustee (*z*), she may surrender the same as if she were a feme sole. And under the Married Women's Property Act, 1882 (*a*), a married woman may dispose of copyholds, which belong to her as her separate property by virtue of that Act, in the same manner as if she were a feme sole.

Surrender of
lands of
wife.

Married
woman bare

Copyholds,
which are
wife's sepa-
rate property.

When the surrender has been made, the surrenderee has, at any time, a right to procure *admittance* to the lands surrendered to his use; and, on such admittance, he becomes at once tenant to the lord, and is bound to pay him the customary fine. This admittance is usually taken immediately (*b*); but, if obtained at any future time, it will relate back to the surrender; so that, if the surrenderor should, subsequently to the surrender, have surrendered to any other person, the admittance of the former surrenderee, even though it should be subsequent to the admittance of the latter, will completely displace his estate (*c*). Formerly a steward was unable to admit tenants out of a manor (*d*); but, by the Copyhold Act of 1841, the lord, his steward, or deputy, may admit at any time, and at any place, either within or out of the manor, and without holding a Court; and the admission is rendered valid without any presentment of the sur-

Admittance.

Admittance
may now be
had out of
the manor

(*t*) Co. Cop. s. 35; Tracts, p. 79. • pp. 270, 271, 280.

(*u*) 1 Watk. Cop. 63.

(*b*) See Appendix (G).

(*x*) Stat. 37 & 38 Vict. c. 78.

(*c*) 1 Watk. Cop. 103.

(*y*) Sect. 6.

(*d*) *Doc d. Leach v. Whittaker*,

(*z*) See ante, pp. 141, 280.

6 B. & Ad. 409, 435; *Doc d.*

(*a*) Stat. 45 & 46 Vict. c. 75,

Gutteridge v. Sowerby, 7 C. B.,

ss. 1 (sub-s. 1), 2, 5; see ante,

N. S. 599.

render, in pursuance of which admission may have been granted (*e*).

**Alienation
by will.**

The alienation of copyholds by will was formerly effected in a similar manner to alienation *inter vivos*. It was necessary that the tenant who wished to devise his estate should first make a surrender of it to the use of his will. His will then formed part of the surrender, and no particular form of execution or attestation was necessary. The devisee, on the decease of his testator, was, until admittance, in the same position as a surrenderee (*f*). By a statute of Geo. III. (*g*), a devise of copyholds, without any surrender to the use of the will, was rendered as valid as if a surrender had been made (*h*). The Act for the amendment of the laws with respect to wills requires that wills of copyhold lands should be executed and attested in the same manner as wills of freeholds (*i*). But a surrender to the use of the will is still unnecessary; and a surrenderee, or devisee, who has not been admitted, is now empowered to devise his interest (*j*). Formerly, the devisee under a will was accustomed, at the next Customary Court held after the decease of his testator, to bring the will into Court; and a presentment was then made of the decease of the testator, and of so much of his will as related to the devise. After this presentment the devisee was admitted, according to the tenor of the will. But under the Copyhold Act of 1841, the mere delivery to the lord, or his steward, or deputy steward, of a copy of the will is sufficient to authorize its entry on the court rolls, without the necessity of any presentment; and

**Presentment
of will,**

**now unneces-
sary**

(*e*) Stat. 4 & 5 Vict. c. 35, ss. 88, 90.

(*f*) *Wainwright v. Elwell*, 1 Mad. 627; *Phillips v. Phillips*, 1 My. & K. 649, 664.

(*g*) 55 Geo. III. c. 192, 12th July, 1815.

(*h*) *Doe d. Nethercote v. Bartle*, 5 B. & Ald. 492.

(*i*) Stat. 7 Will. IV. & 1 Vict. c. 26, ss. 2, 3, 4, 5, 9; see ante, p. 246; *Garland v. Mead*, L. R. 6 Q. B. 441.

(*j*) Sect. 3.

OF THE ALIENATION OF COPYHOLDS.

the lord, or his steward, or deputy steward, may admit the devisee at once, without holding any Court for the purpose (*k*).

Sometimes, on the decease of a tenant, no person came in to be admitted as his heir or devisee. In this case the lord, after making due proclamation at three consecutive Courts of the manor for any person having right to the premises to claim the same and be admitted thereto, is entitled to seize the lands into his own hands *quousque*, as it is called, that is, *until* some person claims admittance (*l*); and by the special custom of some manors, he is entitled to seize the lands absolutely. But as this right of the lord might be very prejudicial to infants, married women, and lunatics or idiots entitled to admittance to any copyhold lands, in consequence of their inability to appear, special provision has been made by Act of Parliament in their behalf (*m*). Such persons are accordingly authorized to appear, either in person or by their guardian, attorney or committee, as the case may be (*n*); and in default of such appearance, the lord or his steward is empowered to appoint any fit person to be attorney for that purpose only, and by such attorney to admit every such infant, married woman, lunatic or idiot, and to impose the proper fine (*o*). If the fine be not paid, the lord may enter and receive the rents till it be satisfied out of them (*p*); and if the guardian of any infant, the husband of any married woman, or the committee of any lunatic or idiot, should

If no claim admittance, the lord may

Provision in

women, lunatics and idiots.

(*k*) Stat. 4 & 5 Vict. c. 35, ss. 88, 89, 90.

(*l*) 1 Watk. Cop. 234; 1 Scriv. Cop. 355; *Doe d. Borer v. True-man*, 1 Barn. & Adol. 736.

(*m*) Stats. 11 Geo. IV. & 1 Will. IV. c. 65; and 16 & 17 Vict. c. 70, s. 108 et seq.

(*n*) Stats. 11 Geo. IV. & 1 Will. IV. c. 65, ss. 3, 4; 16 & 17 Vict. c. 70, s. 108.

(*o*) Stats. 11 Geo. IV. & 1 Will. IV. c. 65, s. 5; 16 & 17 Vict. c. 70, ss. 108, 109.

(*p*) Stats. 11 Geo. IV. & 1 Will. IV. c. 65, ss. 6, 7; 16 & 17 Vict. c. 70, s. 110.

pay the fine, he will be entitled to a like privilege (*q*). But no absolute forfeiture of the lands is to be incurred by the neglect or refusal of any infant, married woman, lunatic or idiot to come in and be admitted, or for their omission, denial or refusal to pay the fine imposed on their admittance (*r*).

Statute of
Uses does
not apply to
copyholds.

Although mention has been made of surrenders *to the use* of the surrenderee, it must not, therefore, be supposed that the Statute of Uses (*s*) has any application to copyhold lands. This statute relates exclusively to freeholds. The seisin or feudal possession of all copyhold land ever remains, as we have seen (*t*), vested in the lord of the manor. Notwithstanding that custom has given to the copyholder the enjoyment of the lands, they still remain, in contemplation of law, the lord's freehold. The copyholder cannot, therefore, simply by means of a surrender to his use from a former copyholder, be deemed, in the words of the Statute of Uses, in lawful seisin for such estate as he has in the use; for the estate of the surrenderor is customary only, and the estate of the surrenderee cannot, consequently, be greater. Custom, however, has now rendered the title of the copyholder quite independent of that of his lord. When a surrender of copyholds is made into the hands of the lord *to the use* of any person, the lord is now merely an instrument for carrying the intended alienation into effect; and the title of the lord, so that he be lord *de facto*, is quite immaterial to the validity either of the surrender or of the subsequent admittance of the surrenderee (*u*). But if a surrender should be made by one person to the use of another,

Trusts.

Stats. 11 Geo. IV. & 1 Will.
IV. c. 65, s. 8; 16 & 17 Vict.
c. 70, s. 111.

(*r*) Stats. 11 Geo. IV. & 1
Will. IV. c. 65, s. 9; 16 & 17
Vict. c. 70, s. 112. See *Doe* d.
Twining v. *Muscott*, 12 Mee. &

Wels. 832, 842; *Dimes* v. *Grand
Junction Canal Company*, 9 Q. B.
469, 510.

(*s*) Stat. 27 Hen. VIII. c. 10;
ante, p. 188.

(*t*) Ante, p. 418.

(*u*) 1 Watk. Cop. 74.

upon trust for a third, the High Court of Justice would exercise the same jurisdiction over the surrenderee, in compelling him to perform the trust, as it would in the case of freeholds vested in a trustee. And when copyhold lands form the subject of settlement, the usual plan is to surrender them to the use of trustees, as joint tenants of a customary estate in fee simple, upon such trusts as will effect, in equity, the settlement intended. The trustees thus become the legal copyhold tenants of the lord, and account for the rents and profits to the persons beneficially entitled. The equitable estates which are thus created are of a similar nature to the equitable estates in freeholds, of which we have already spoken (*x*); and a trust for the separate use of a married woman might be created as well out of copyhold as out of freehold lands (*y*). An equitable estate tail in copyholds may be barred by deed, in the same manner in every respect as if the lands had been of freehold tenure (*z*). But the deed, instead of being inrolled in the Court of Chancery or the Supreme Court (*a*), must be entered on the court rolls of the manor (*b*). And if there be a protector, and he consent to the disposition by a distinct deed, such deed must be executed by him either on, or any time before, the day on which the deed barring the entail is executed; and the deed of consent must also be entered on the court rolls (*c*).

Settlements.

Separate use.

Equitable estate tail may be barred by deed.

As the owner of an equitable estate has, from the nature of his estate, no legal rights to the lands, he is not himself a copyholder. He is not a tenant to the lord: this position is filled by his trustee. The trustee, therefore,

Equitable estate cannot

(*x*) Ante, p. 193 et seq.

(*y*) See ante, pp. 267, 269.

(*z*) See ante, pp. 70, 74 et seq.

(*a*) Stat. 3 & 4 Will. IV. c. 74, s. 54. See ante, p. 70.

(*b*) Sect. 53. It has been decided, contrary to the prevalent

impression, that the entry must be made within six calendar months. *Honeywood v. Forster*, M. R., 9 W. R. 855; 30 Beav. 1; *Gibbons v. Snape*, 32 Beav. 130.

(*c*) Stat. 3 & 4 Will. IV. c. 74, s. 53.

Exceptions.

Tenant of equitable estate tail may bar entail by surrender.

Husband and wife may surrender wife's equitable estate.

is admitted, and may surrender ; but the *cœstui que trust* cannot adopt these means of disposing of his equitable interest (*d*). To this general rule, however, there have been admitted, for convenience sake, two exceptions. The first is that of a tenant in tail whose estate is merely equitable : by the Act for the abolition of fines and recoveries (*e*), the tenant of a merely equitable estate tail is empowered to bar the entail, either by deed in the manner above described, or by surrender in the same manner as if his estate were legal (*f*). The second exception relates to married women, it being provided by the same Act (*g*) that, whenever a husband and wife shall surrender any copyhold lands in which she alone, or she and her husband in her right, may have any equitable estate or interest, the wife shall be separately examined in the same manner as she would have been, had her estate or interest been at law instead of in equity merely (*h*) ; and every such surrender, when such examination shall be taken, shall be binding on the married woman and all persons claiming under her ; and all surrenders previously made of lands similarly circumstanced, where the wife shall have been separately examined by the person taking the surrender, are thereby declared to be good and valid. But these methods of conveyance, though tolerated by the law, are not in accordance with principle ; for an equitable estate is, strictly speaking, an estate in the contemplation of equity only, and has no existence anywhere else. As, therefore, an equitable estate tail in copyholds may properly be barred by a deed entered on the court rolls of the manor, so an equitable estate or interest in copyholds belonging to a married woman was more properly conveyed by a deed, executed with her husband's concur-

(*d*) 1 Scriv. Cop. 262.

(*g*) Stat. 3 & 4 Will. IV. c. 74,

(*e*) Stat. 3 & 4 Will. IV. c. 74, s. 90.

s. 50.

(*h*) See ante, p. 441.

(*f*) See ante, p. 427.

rence, and *acknowledged* by her in the same manner as if the lands were freehold (*i*). And the Act for the abolition of fines and recoveries, by which this mode of conveyance is authorized, does not require that such a deed should be entered on the court rolls. If a married woman's equitable estate in copyholds belong to her for her separate use, or as her separate property under the Married Women's Property Act, 1882, she may dispose thereof in the same manner as if she were a feme sole (*k*).

Copyhold estates admit of remainders analogous to Remainders. those which may be created in estates of freehold (*l*). And when a surrender or devise is made to the use of any person for life, with remainders over, the admission of the tenant for life is the admission of all persons having estates in remainder, unless there be in the manor a special custom to the contrary (*m*). A vested estate in remainder is capable of alienation by the usual mode of surrender and admittance. Contingent Co remainders of copyholds have always had this advantage, that they have never been liable to destruction by the sudden determination of the particular estate on which they depend. The freehold, vested in the lord, is said to be the means of preserving such remainders until the time when the particular estate would regularly have expired (*n*). In this respect they resemble contingent remainders of equitable or trust estates of freeholds, as to which we have seen, that the legal seisin, vested in the

(*i*) Stat. 3 & 4 Will. IV. c. 74, s. 77. See ante, pp. 267, 279.

(*k*) See ante, pp. 267—271, 280, 446.

(*l*) See ante, pp. 299, 311.

(*m*) 1 Watk. Cop. 276; *Doe* d. *Winder* v. *Lawes*, 7 Ad. & E. 195; *Smith* v. *Glasscock*, 4 C. B., N. S. 357; *Randfield* v. *Randfield*,

1 Drew. & S. 310. See, however, as to the reversioner, *Reg.* v. *Lady of the Manor of Dallingham*, 8 Ad. & E. 858.

(*n*) *Fearne*, Cont. Rem. 319; 1 Watk. Cop. 196; 1 Scriv. Cop. 477; *Pickering* v. *Grey*, 30 Beav. 352.

trustees, preserves the remainders from destruction (*o*) ; but if the contingent remainder be not ready to come into possession the moment the particular estate would naturally and regularly have expired, such contingent remainder will fail altogether (*p*). To this rule, however,

Act to amend. an exception has now been made by the Act to amend the law as to contingent remainders (*q*), which extends to hereditaments of any tenure ; although it affects only such a contingent remainder as would have been valid as a springing or shifting use, or executory devise or other limitation, had it not had a sufficient estate to support it as a contingent remainder.

Executory
devises.

Executory devises of copyholds, similar in all respects to executory devises of freeholds, have long been permitted (*r*). And directions to executors to sell the copyhold lands of their testator (which directions, we have seen (*s*), give rise to executory interests) are still in common use ; for, when such a direction is given, the executors, taking only a power and no estate, have no occasion to be admitted ; and if they can sell before the lord has had time to hold his three Customary Courts for making proclamation in order to seize the land *quousque* (*t*), the purchaser from them will alone require admittance by virtue of his executory estate which arose on the sale. By this means the expense of only one admittance is incurred ; whereas, had the lands been devised to the executors in trust to sell, they must first have been admitted under the will, and then have surrendered to the purchaser, who again must have been admitted under their surrender. And in a recent case, where a testator devised copyholds to such uses as

(*o*) Ante, p. 334.

(*p*) Gilb. Ten. 266 ; Fearne, Cont. Rem. 320.

(*q*) Stat. 40 & 41 Vict. c. 33, ante, pp. 320, 321, 366, 371.

(*r*) 1 Watk Cop. 210.

(*s*) Ante, p. 362. The stat. 21 Hen. VIII. c. 4 applies to copyholds ; *Peppercorn v. Wayman*, 5 De Gex & S. 230 ; ante, p. 363.

(*t*) See ante, p. 443.

his trustees should appoint, and subject thereto to the use of his trustees, their heirs and assigns for ever, with a direction that they should sell his copyholds, it was decided that the trustees could make a good title without being admitted, even although the lord had in the meantime seized the land *quousque* for want of a tenant (*u*). But it has recently been decided that the lord of a manor is not bound to accept a surrender of copyholds *inter vivos*, to such uses as the surrenderee shall appoint, and, in default of appointment, to the use of the surrenderee, his heirs and assigns (*x*). This decision is in accordance with the old rule, which construed surrenders of copyholds in the same manner as a conveyance of freeholds *inter vivos* at common law (*y*). If, however, the lord should accept such a surrender, he will be bound by it, and must admit the appointee under the power of appointment, in case such power should be exercised (*z*).

Lord not
to
a sur-
inter
to shift-

With regard to the interest possessed by husband and wife in each other's copyhold lands, the husband was entitled to the whole income of his wife's land during her coverture, unless the land were settled on trust for her separate use (*a*). But the Married Women's Property Act, 1870 (*b*), provided (*c*), as we have seen (*d*), that when any copyhold or customary property should descend upon any woman married after the passing of

Husband and
Married

(*u*) *Glass v. Richardson*, 9 Hare, 698; 2 De Gex, M. & G. 658; and see *The Queen v. Corbett*, 1 E. & B. 836; *The Queen v. Wilson*, 3 Best & Smith, 201.

(*x*) *Flack v. The Master, Fellows and Scholars of Downing College*, C. P., 17 Jur. 697; 13 C. B. 945.

(*y*) 1 Watk. Cop. 108, 110; 1 Scriv. Cop. 178.

(*z*) *The King v. The Lord of the W.R.P.*

Manor of Oundle, 1 Ad. & E. 283; *Boddington v. Abernethy*, 5 B. & C. 776; 9 Dow. & Ry. 626; 1 Scriv. Cop. 226, 229; *Eddleston v. Collins*, 3 De Gex, M. & G. 1.

(*a*) 1 Watk. Cop. 273, 335, 4th ed. See ante, pp. 266—268.

(*b*) Stat. 33 & 34 Vict. c. 93, passed 9th Aug. 1870.

(*c*) Sect. 8.

(*d*) Ante, p. 270.

Wife's separate property.

Curtesy.

Freebench.

Manor of Cheltenham is an exception.

that Act, as heiress or co-heiress of an intestate, the rents and profits of such property should, subject and without prejudice to the trusts of any settlement affecting the same, belong to such woman for her separate use. And under the Married Women's Property Act, 1882, a married woman is entitled to have and to hold any copyhold land, which belongs to her as her separate property under that Act, and the rents and profits thereof, in the same manner as if she were 'a feme sole (*e*). A special custom appears to be necessary to entitle a husband to be tenant by curtesy of his wife's copyholds (*f*). A special custom also is required to entitle the wife to any interest in the lands of her husband after his decease. Where such custom exists, the wife's interest is termed her *freebench*; and it generally consists of a life interest in one divided third part of the lands, or sometimes of a life interest in the entirety (*g*); and, like dower under the old law, freebench is paramount to the husband's debts (*h*). Freebench, however, usually differs from the ancient right of dower in this important particular, that whereas the widow was entitled to dower of all freehold lands of which her husband was solely seised *at any time* during the coverture (*i*), the right to freebench does not usually attach until the actual decease of the husband (*k*), and it may be defeated by a devise of the lands by the will of the husband (*l*). Freebench, therefore, is in general no impediment to the free alienation by the husband of his copyhold lands, without his wife's concurrence. To this rule the important manor of Cheltenham forms an exception; for, by the custom of this manor, as settled by Act of Parliament, the freebench of widows attaches,

(*e*) See ante, pp. 270—272.

621.

(*f*) 2 Watk. Cop. 71. See as to freeholds, ante, pp. 274—277.

(*i*) Ante, p. 282.

(*k*) 2 Watk. Cop. 73.

(*g*) 1 Scriv. Cop. 89.

(*l*) *Lacey v. Hill*, M. R., L. R.,

Spyer v. Hyatt, 20 Beav. 19 E. 346.

like the ancient right of dower out of freeholds, on all the copyhold lands of inheritance of which their husbands were tenants at any time during the coverture (*m*). The Act for the amendment of the law relating to Dower Act. dower (*n*) does not extend to freebench (*o*).

(*m*) *Doe d. Riddell v. Gwinnell*, ante, p. 285.

1 Q. B. 682.

(*o*) *Smith v. Adams*, 18 Beav.

(*n*) Stat. 3 & 4 Will. IV. c. 105; 499; 5 De Gex, M. & G. 712.

PART IV.

OF PERSONAL INTERESTS IN REAL ESTATE.

THE subjects which have hitherto occupied our attention derive a great interest from the antiquity of their origin. We have seen that the difference between freehold and copyhold tenure has arisen from the distinction which prevailed, in ancient times, between free tenure and tenure in villenage (*a*) ; and that estates of freehold in lands and tenements owe their origin to the ancient feudal system (*b*). The law of real property, in which term both freehold and copyhold interests are included, is full of rules and principles to be explained only by a reference to antiquity ; and many of those rules and principles were, it must be confessed, much more reasonable and useful when they were first instituted than they are at present. The subjects, however, on which we are now about to be engaged, possess little of the interest which arises from antiquity ; although their present value and importance are unquestionably great. The principal interests of a personal nature derived from landed property, are a term of years and a mortgage debt. The origin and reason of the personal nature of a term of years in land have been already attempted to be explained (*c*) ; and at the present day, leasehold interests in land, in which amongst other things all building leases are included, form a subject sufficiently important to require a separate consideration. The personal nature of a mortgage debt was not clearly established till long after a term of years was

Term of
years.

Mortgage
debt.

(*a*) Ante, pp. 28, 145.

(*b*) Ante, p. 21.

(*c*) Ante, p. 9, and note (*c*) to
p. 14.

considered as a chattel (*d*). But it is now settled that every mortgage, whether with or without a bond or covenant for the repayment of the money, forms part of the personal estate of the lender or mortgagee (*e*). And when it is known that the larger proportion of the lands in this kingdom is at present in mortgage, a fact generally allowed, it is evident that a chapter devoted to mortgages cannot be superfluous.

(*d*) *Thornborough v. Baker*, 1 Swanst. 636.
Cha. Ca. 283; 3 Swanst. 628, (*e*) Co. Litt. 208 a, n. (1).
anno 1675; *Tabor v. Tabor*, 3

CHAPTER I.

OF A TERM OF YEARS.

Two kinds of
of

At the present day, one of the most important kinds of chattel or personal interests in landed property is a term of years, by which is understood, not the time merely for which a lease is granted, but also the interest acquired by the lessee. Terms of years may practically be considered as of two kinds; first, those which are created by ordinary leases, which are subject to a yearly rent, which seldom exceed ninety-nine years, and in respect of which so large a number of the occupiers of lands and houses are entitled to their occupation; and secondly, those which are created by settlements, wills, or mortgage deeds, in respect of which no rent is usually reserved, which are frequently for one thousand years or more, which are often vested in trustees, and the object of which is usually to secure the payment of money by the owner of the land. But although terms of years of different lengths are thus created for different purposes, it must not, therefore, be supposed that a long term of years is an interest of a different nature from a short one. On the contrary, all terms of years of whatever length possess precisely the same attributes in the eye of the law.

A tenancy at
will.

The consideration of terms of the former kind, or those created by ordinary leases, may conveniently be preceded by a short notice of a tenancy at will, and a tenancy by sufferance. A tenancy at will may be

created by parol (*a*), or by deed; it arises when a person lets land to another, to hold at the will of the lessor or person letting (*b*). The lessee, or person taking the lands, is called a tenant at will; and, as he may be turned out when his landlord pleases, so he may leave when he likes. A tenant at will is not answerable for mere permissive waste (*c*). He is allowed, if turned out by his landlord, to reap what he has sown, or, as it is legally expressed, to take the emblements (*d*). But as this kind of letting is very inconvenient to both parties, it is scarcely ever adopted; and, in construction of law, a lease at an annual rent, made generally without expressly stating it to be at will (*e*), and without limiting any certain period, is not a lease at will, but a lease from year to year (*f*), of which we shall presently speak. When property is vested in trustees, the cestui que trust is, as we have seen (*g*), absolutely entitled to such property in equity. But as the Courts of law did not recognize trusts, they considered the cestui que trust, when in possession, to be merely the tenant at will of his trustees (*h*); and as the distinction between law and equity has not been abolished by the Judicature Acts, a cestui que trust, whilst in possession, is still a tenant at will at law, although absolutely entitled in equity. A tenancy by sufferance is when a person, who has originally come into possession by

Emblements.

Cestui que trust tenant at will.

Tenancy by sufferance.

(*a*) Stat. 29 Car. II. c. 3, s. 1.

(*b*) Litt. s. 68; 2 Black. Com. 145.

(*c*) *Harnett v. Maitland*, 15 Mee. & Wels. 257.

(*d*) Litt. s. 68; see *Graves v. Weld*, 5 B. & Adol. 105. A tenant at will might be entitled to compensation for improvements under the Agricultural Holdings (England) Act, 1875 (stat. 38 & 39 Vict. c. 92), amended by stat. 39 & 40 Vict. c. 74, and repealed by

stat. 46 & 47 Vict. c. 61, s. 62.

(*e*) *Doe d. Bastow v. Cox*, 11 Q. B. 122; *Doe d. Dixie v. Davies*, 7 Exch. Rep. 89.

(*f*) *Right d. Flower v. Darby*, 1 T. Rep. 159, 163.

(*g*) Ante, pp. 192, 193, and note (*y*).

(*h*) *Earl of Pomfret v. Lord Windsor*, 2 Ves. sen. 472, 481. See *Melling v. Leak*, 16 C. B. 652.

a lawful title, holds such possession after his title has determined.

Lease from
year to year.

Agricultural
Holdings
(England)
Act, 1883.

A lease from year to year is a method of letting very commonly adopted: in most cases it is much more advantageous to both landlord and tenant than a lease at will. The advantage consists in this, that both landlord and tenant are entitled to notice before the tenancy can be determined by the other of them (*i*). By the common law, this notice must be given at least half a year before the expiration of the current year of the tenancy (*j*); for the tenancy cannot be determined by one only of the parties, except at the end of any number of whole years from the time it began. So that, if the tenant enter on any quarter day, he can quit only on the same quarter day: when once in possession, he has a right to remain for a year; and if no notice to quit be given for half a year after he has had possession, he will have a right to remain two whole years from the time he came in; and so on from year to year. But in the case of a tenancy from year to year of a holding, to which the Agricultural Holdings (England) Act, 1883 (*k*), applies, a year's notice, expiring with a year of tenancy, is now required, in order to determine the tenancy, by the 33rd section of the Act; unless the landlord and tenant of the holding by writing under their hands agree that this section shall not apply; in which case a half year's notice will be sufficient. This section, however, does not extend to a case where the tenant is adjudged bankrupt, or has filed a petition for a composition or arrangement with his creditors (*l*).

(*i*) As to the effect of an assignment of his interest by a tenant from year to year, see *Allcock v. Moorhouse*, 9 Q. B. D. 366.

(*j*) *Right d. Flower v. Darby*,

1 T. Rep. 159, 163; and see *Doe d. Lord Bradford v. Watkins*, 7 East, 551.

(*k*) Stat. 46 & 47 Vict. c. 61.

(*l*) The Agricultural Holdings (England) Act, 1875, repealed by

Under the same Act (*m*), a landlord may give a tenant from year to year notice to quit part only of his holding if the notice be given with a view to the use of the land for any of the improvements specified in the Act, and it be so stated in the notice; the tenant having the option, by counter notice in writing within twenty-eight days, to accept the same as notice to quit the entire holding. This Act does not apply to any holding which is not either wholly agricultural or wholly pastoral, or in part agricultural and as to the residue pastoral, or in whole or in part cultivated as a market garden; or to any holding let to the tenant during his continuance in any office, appointment, or employment held under the landlord (*n*). A lease from year to year can be made by parol or word of mouth (*o*), if the rent reserved amount to two-thirds at least of the full improved value of the lands; for if the rent reserved do not amount to so much, the Statute of Frauds declares that such parol lease shall have the force and effect of a lease at will only (*p*). A lease from year to year, reserving a less amount of rent, must be made by deed (*q*). The best way to create this kind of tenancy is to let the lands to hold "from year to year" simply, for much litigation has arisen from the use of more circuitous methods of saying the same thing (*r*).

A lease for a fixed number of years may, by the Lease for a

the Act of 1883, contained similar provisions; see stat. 38 & 39 Vict. c. 92, ss. 51, 54—58.

(*m*) Stat. 46 & 47 Vict. c. 61, s. 41. The Act of 1875 contained similar provisions; see stat. 38 & 39 Vict. c. 92, ss. 52, 54—58.

(*n*) Stat. 46 & 47 Vict. c. 61, s. 54. The Act of 1875 applied to agricultural and pastoral holdings of two acres and upwards in extent; see stat. 38 & 39 Vict.

c. 92, s. 58.

(*o*) *Legg v. Hackett*, Bac. Abr. tit. Leases (L. 3); *S. C.* nom. *Legg v. Strudwick*, 2 Salk. 414.

(*p*) 29 Car. II. c. 3, ss. 1, 2.

(*q*) Stat. 8 & 9 Vict. c. 106, s. 3.

(*r*) See Bac. Abr. tit. Leases and Terms for Years (L. 3); *Doe d. Clarke v. Smaridge*, 7 Q. B. 957.

number of
years.

Leases in
writing now
required to be
by deed.

No formal
words re-
quired to
make a lease.

Statute of Frauds, be made by parol, if the term do not exceed three years from the making thereof, and if the rent reserved amount to two-thirds, at least, of the full improved value of the land (*s*). Leases for a longer term of years, or at a lower rent, were required, by the Statute of Frauds (*t*), to be put into writing and signed by the parties making the same, or their agents thereunto lawfully authorized by writing. But a lease of a separate incorporeal hereditament was always required to be made by deed (*u*). And the Act to amend the law of real property now provides that a lease, required by law to be in writing, of any tenements or hereditaments shall be void *at law*, unless made by deed (*x*). But such a lease, although void as a lease for want of its being by deed, may be good as an agreement to grant a lease, *ut res magis valeat quam pereat* (*y*). It does not require any formal words to make a lease for years. The words commonly employed are "demise, lease, and to farm let;" but any words indicating an intention to give possession of the lands for a determinate time will be sufficient (*z*). Accordingly, it sometimes happened, previously to the Act, that what was meant by the parties merely as an agreement to execute a lease, was in law construed as itself an actual lease; and very many law suits arose out of the question, whether the effect of a memorandum was in law an actual lease, or merely an agreement to

(*s*) 29 Car. II. c. 3, s. 2; *Lord Bolton v. Tomlin*, 5 A. & E. 856.

(*t*) 29 Car. II. c. 3, s. 1.

(*u*) *Bird v. Higginson*, 2 Adol. & Ell. 696; 6 Adol. & Ell. 824; S. C. 4 Nev. & Man. 505. See ante, p. 288.

(*x*) Stat. 8 & 9 Vict. c. 106, s. 3, repealing stat. 7 & 8 Vict. c. 76, s. 4, to the same effect.

(*y*) *Parker v. Taswell*, V.-C. S., 4 Jur., N. S. 183, affirmed 2 De

Gex & Jones, 559; *Bond v. Rosling*, Q. B., 8 Jur., N. S. 78; 1 Best & Smith, 371; *Tidy v. Mollett*, 16 C. B., N. S. 298; *Rollason v. Leon*, Exch., 17 Jur., N. S. 608; 7 H. & N. 73, overruling the case of *Stratton v. Pettitt*, 16 C. B. 420.

(*z*) Bac. Abr. tit. Leases and Terms for Years (K); *Curling v. Mills*, 6 Man. & Gran. 173.

make one. Thus, a mere memorandum in writing that A. agreed to let, and B. agreed to take, a house or farm for so many years, at such a rent, was, if signed by the parties, as much a lease as if the most formal words had been employed (a). By such a memorandum a term of years was created in the premises, and was vested in the lessee, immediately on his entry, instead of the lessee acquiring, as at present, merely a right to have a lease granted to him in accordance with the agreement (b).

(a) *Poole v. Bentley*, 12 East, 168; *Doe d. Walker v. Groves*, 15 East, 244; *Doe d. Pearson v. Ries*, 8 Bing. 178; *S. C. 1 Moo. & Scott*, 259; *Warman v. Faithfull*, 5 Barn. & Adol. 1042; *Pearce v. Cheslyn*, 4 Adol. & Ellis, 225.

(b) By the Stamp Act, 1870, leases, with some exceptions, are subject to an *ad valorem* duty on the rent reserved as follows:—

	If the term does not exceed 35 Years or is indefinite.		If the term being definite exceeds 35 Years, but does not exceed 100 Years.			If the term being definite exceeds 100 Years.		
	s.	d.	£	s.	d.	£	s.	d.
Where the yearly rent shall not exceed £5	0	6	0	3	0	0	6	0
Shall exceed £5 and not exceed £10	1	0	0	6	0	0	12	0
" 10 " 15	1	6	0	9	0	0	18	0
" 15 " 20	2	0	0	12	0	1	4	0
" 20 " 25	2	6	0	15	0	1	10	0
" 25 " 50	5	0	1	10	0	3	0	0
" 50 " 75	7	6	2	5	0	4	10	0
" 75 " 100	10	0	3	0	0	6	0	0
And where the same shall exceed £100, then for every £50, and also for any fractional part of £50	5	0	1	10	0	3	0	0

And any premium which may be paid for the lease is also charged with the same *ad valorem* duty as on a conveyance upon the sale of lands for the same consideration. The counterpart bears a duty of five shillings, unless the duty on the lease is less than five shillings, in which case the counterpart bears the same duty as the lease; and if not executed by the lessor, it does not require any stamp denoting that the proper duty has been paid on the original. Agreements for leases for any term not exceeding thirty-five years are subject to the same duty as leases. Leases of furnished houses for any term less than a year, where the rent for such term exceeds 25*l.*, are subject to a duty of half-a-crown. And any lease of a tenement or part thereof

A lease may be made for any number of years.

There must be a period fixed for the ending.

A term may be made to commence at a future time.

There is no limit to the number of years for which a lease may be granted; a lease may be made for 99, 100, 1,000, or any other number of years; the only requisite on this point is, that there be a definite period of time fixed in the lease, at which the term granted must end (*c*); and it is this fixed period of ending which distinguishes a *term* from an estate of freehold. Thus, a lease to A. for his life is a conveyance of an estate of freehold, and must be carried into effect by the proper method for conveying the legal seisin; but a lease to A. for ninety-nine years, if he shall so long live, gives him only a term of years, on account of the absolute certainty of the determination of the interest granted, at a given time *fixed in the lease*. Besides the fixed time for the term to end, there must also be a time fixed from which the term is to begin; and this time may, if the parties please, be at a future period (*d*). Thus, a lease may be made for 100 years from next Christmas. For, as leases anciently were contracts between the landlords and their husbandmen, and had nothing to do with the freehold or feudal possession (*e*), there was no objection to the tenant's right of occupation being deferred to a future time.

Entry.

When the lease is made, the lessee does not become complete tenant by lease to the lessor until he has entered on the lands let (*f*). Before entry, he has no estate, but only a right to have the lands for the term by

for any definite term less than a year, at a rent not exceeding the rate of 10*l.* per annum, is now chargeable with the stamp duty of one penny only. Stat. 33 & 34 Vict. c. 97. Covenants in a lease to make improvements or additions to the property do not subject it to any additional duty. Stat. 33 & 34 Vict. c. 44; 33 & 34 Vict. c. 97, s. 98.

(*c*) Co. Litt. 45 b; 2 Black. Com. 143.

(*d*) 2 Black. Com. 143.

See ante, p. 10.

(*f*) Litt. s. 58; Co. Litt. 46 b; *Miller v. Green*, 8 Bingh. 92; ante, p. 217.

force of the lease (*g*), called in law an *interesse termini*. *Interesse termini.*
 But if the lease should be made by a bargain and sale, *Bargain and sale.*
 or any other conveyance operating by virtue of the Statute of Uses, the lessee will, as we have seen (*h*),
 have the whole term vested in him at once, in the same
 manner as if he had actually entered.

The circumstance, that a lease for years was anciently nothing more than a mere contract, explains a curious point of law relating to the creation of leases for years, which does not hold with respect to the creation of any greater interest in land. If a man should by indenture Lease for lease lands, in which he has no legal interest, for a term of years, both lessor and lessee will be *estopped* during the term, or forbidden to deny the validity of the lease. This might have been expected. But the law goes further, and holds, that if the lessor should at any time during the lease acquire the lands he has so let, the lease, which before operated only by estoppel, shall now take effect out of the newly-acquired estate of the lessor, and shall become for all purposes a regular estate for a term of years (*i*). If, however, the lessor has, at the Exception, time of making the lease, any interest in the lands he lets, such interest only will pass, and the lease will have interest no further effect by way of estoppel, though the interest purported to be granted be really greater than the lessor had at the time power to grant (*k*). Thus, if A., a lessee for the life of B., makes a lease for years by indenture, and afterwards purchases the reversion in fee, and then B. dies, A. may at law avoid his own lease, though several of the years expressed in the lease may be still

(*g*) Litt. s. 459; Bac. Abr. tit. Leases and Terms for Years (M).

(*h*) Ante, p. 221.

(*i*) Co. Litt. 47 b; Bac. Abr. tit. Leases and Terms for Years (O); 2 Prest. Abst. 211; Webb v.

Austin, 7 Man. & Gran. 701.

(*k*) Co. Litt. 47 b; Hill v. Saunders, 4 Barn. & Cress. 529; Doe d. Strode v. Seaton, 2 Cro. Mee. & Rosc. 728, 730.

to come; for, as A. had an interest in the lands for the life of B., a term of years determinable on B.'s life passed to the lessee. But if in such a case the lease was made for valuable consideration, Equity would oblige the lessor to make good the term out of the interest he had acquired (*l*).

Rent and
covenants.

The first kind of leases for years to which we have adverted, namely, those taken for the purpose of occupation, are usually made subject to the payment of a yearly rent (*m*), and to the observance and performance of certain covenants, amongst which a covenant to pay the rent is always included. The rent and covenants are thus constantly binding on the lessee, during the whole continuance of the term, notwithstanding any assignment which he may make (*n*). On assigning leasehold premises, the assignee is therefore bound to enter into a covenant with the assignor, to indemnify him against the payment of the rent reserved, and the observance and performance of the covenants contained in the lease (*o*). The assignee, as such, is liable to the landlord for the rent which may be unpaid, and for the covenants which may be broken during the time that the term remains vested in him, although he may never enter into actual possession (*p*), provided that such covenants relate to the premises let: and a covenant to do any act upon the premises, as to build a wall, is binding on the assignee, if the lessee has covenanted for himself *and his assigns* to do the act (*q*). But a covenant to do any act upon premises not comprised in the

(*l*) 2 Prest. Abst. 217.

(*m*) See ante, p. 292 et seq.

(*n*) *Mayor of Swansea v. Thomas*, 10 Q. B. D. 48; *Hill v. East and West India Dock Co.*, 9 App. Cas. 448.

(*o*) Sugd. Vend. & Pur. 37, 14th ed.

(*p*) *Williams v. Bosanquet*, 1 Brod. & Bing. 238; 3 J. B. Moore, 500.

(*q*) *Spencer's case*, 5 Rep. 16 a; *Hemingway v. Fernandes*, 13 Sim. 228. See *Minshull v. Oakes*, 2 H. & N. 793, 809.

lease cannot be made to bind the assignee (*r*). Covenants which are binding on the assignee are said to *run with the land*, the burden of such covenants passing with the land to every one to whom the term is from time to time assigned. But when the assignee assigns to another, his liability ceases as to any future breach (*s*). In the same manner the benefit of covenants relating to the land, entered into by the lessor, will pass to the assignee; for, though no contract has been made between the lessor and the assignee individually, yet as the latter has become the tenant of the former, a *privity of estate* is said to arise between them, by virtue of which the covenants entered into, when the lease was granted, become mutually binding, and may be enforced by the one against the other (*t*). This mutual right is also confirmed by an express clause of the statute before referred to (*u*), by which assignees of the reversion were enabled to take advantage of conditions of re-entry contained in leases (*x*). By the same statute also, the assignee of the reversion is enabled to take advantage of the covenants entered into by the lessee with the lessor, under whom such assignee claims (*y*),—an advantage, however, which, in some cases, he is said to have previously possessed (*z*).

Covenants
which run
with the land.

The rights and obligations of the successors in estate of a lessor and a lessee with respect to the rent reserved by and the covenants and conditions contained in leases made after the 31st December, 1881, are further regulated by two important sections of the Conveyancing

Leases made
after the 31st
December,
1881.

(*r*) *Keppel v. Bailey*, 2 My. & Keen, 517.

(*s*) *Taylor v. Shum*, 1 Bos. & Pul. 31; *Rowley v. Adams*, 4 M. & Cr. 534.

(*t*) Sugd. Vend. & Pur. 478, note, 3rd ed.

(*u*) Stat. 32 Hen. VIII. c. 34, s. 2.

(*x*) Ante, p. 295.

(*y*) 1 Wms. Saund. 240, n. (3); *Martyn v. Williams*, 1 H. & N. 817.

(*z*) *Vyryan v. Arthur*, 1 Barn. & Cress. 410, 414.

and Law of Property Act, 1881 (*a*). They are as follows:—

(Sect. 10, subs. 1.) Rent reserved by a lease, and the benefit of every covenant or provision therein contained, having reference to the subject-matter thereof, and on the lessees part to be observed or performed, and every condition of re-entry and other condition therein contained, shall be annexed and incident to and shall go with the reversionary estate in the land, or in any part thereof, immediately expectant on the term granted by the lease, notwithstanding severance of that reversionary estate, and shall be capable of being recovered, received, enforced, and taken advantage of by the person from time to time entitled, subject to the term, to the income of the whole or any part, as the case may require, of the land leased.

(Sect. 11, subs. 1.) The obligation of a covenant entered into by a lessor with reference to the subject-matter of the lease shall, if and as far as the lessor has power to bind the reversionary estate immediately expectant on the term granted by the lease, be annexed and incident to and shall go with that reversionary estate, or the several parts thereof, notwithstanding severance of that reversionary estate, and may be taken advantage of and enforced by the person in whom the term is from time to time vested by conveyance, devolution in law, or otherwise; and, if and as far as the lessor has power to bind the person from time to time entitled to that reversionary estate, the obligation aforesaid may be taken advantage of and enforced against any person so entitled.

The effect of these enactments is discussed in the editor's "Conveyancing Statutes" (*b*).

Proviso for
re-entry.

The payment of the rent, and the observance and

(*a*) Stat. 44 & 45 Vict. c. 41.

(*b*) Pp. 104—110.

performance of the covenants are usually further secured by a proviso or condition for re-entry. The proviso for re-entry, so far as it relates to the non-payment of rent, has been already adverted to (c); it enables the landlord or his heirs (and the statutes above mentioned (d) enable his assigns), on non-payment of the rent, to re-enter on the premises let, and re-possess them as if no lease had been made. The landlord, his heirs or assigns could formerly, under the proviso for re-entry on breach of covenants, at once re-enter in the same way upon non-observance or non-performance of the covenants. But a lessor and his successors in estate cannot now enforce a right of re-entry on breach of covenants until the conditions imposed by the Conveyancing and Law of Property Act, 1881 (e), have been complied with. These are mentioned further on.

The proviso for re-entry on breach of covenants was until recently the subject of a curious doctrine; that if an express licence were once given by the landlord for the breach of any covenant, or if the covenant were, not to do a certain act without licence, and licence were once given by the landlord to perform the act, the right of re-entry was gone for ever (f). The ground of this doctrine was, that every condition of re-entry was entire and indivisible; and, as the condition had been waived once, it could not be enforced again. So far as this reason extended to the breach of any covenant, it was certainly intelligible; but its application to a licence to perform an act, which was only prohibited when done without licence, was not very apparent (g). This rule,

Effect of
licence "
breach --
covenant.

(c) Ante, p. 294.

(d) Stats. 32 Hen. VIII. c. 34;
44 & 45 Vict. c. 41, s. 10; see
s. 14, subs. 8.

(e) Stat. 44 & 45 Vict. c. 41,
s. 14.

(f) *Dumpor's case*, 4 Rep. 119;
Brummell v. Macpherson, 14 Ves.
173.

(g) 4 *Jarman's Conveyancing*,
by Sweet, 377, n. (e).

which was well established, was frequently the occasion of great inconvenience to tenants; for no landlord could venture to give a licence to do any act, which might be prohibited by the lease unless done with licence, for fear of losing the benefit of the proviso for re-entry, in case of any future breach of covenant. The only method to be adopted in such a case was, to create a fresh proviso for re-entry on any future breach of the covenants, a proceeding which was of course attended with expense. The term would then, for the future, have been determinable on the new events stated in the proviso; and there was no objection in point of law to such a course; for a term, unlike an estate of freehold, may be made determinable during its continuance, on events which were not contemplated at the time of its creation (*h*). By an Act of the present reign the inconvenient doctrine above mentioned ceased to extend to licences granted to the tenants of Crown lands (*i*). And by a subsequent statute (*k*) it has been provided, that every such licence shall, unless otherwise expressed, extend only to the permission actually given, or to any specific breach of any proviso or covenant made or to be made, or to the actual matter thereby specifically authorized to be done, but not so as to prevent any proceeding for any subsequent breach, unless otherwise specified in such licence. And all rights under covenants and powers of forfeiture and re-entry contained in the lease are to remain in full force, and are to be available as against any subsequent breach or other matter not specifically authorized by the licence, in the same manner as if no such licence had been given; and the condition or right of re-entry is to remain in all respects as if such licence had not been given, except in respect of the particular matter authorized to be done. Provision has

New enactment.
Restriction
on effect of
licence.

(*h*) 2 Prest. Conv. 199.

(*k*) Stat. 22 & 23 Vict. c. 35,

(*i*) Stat. 8 & 9 Vict. c. 99, s. 5. s. 1.

also been made (*l*) that a licence to one of several lessees, or with respect to part only of the property let, shall not destroy the right of re-entry as to the other lessees, or as to the remainder of the property.

Licence to one of several lessees, or as to part only.

The above enactments, however, failed to provide for the case of an actual waiver of a breach of covenant. On this point the law stood thus. The receipt of rent by the landlord, after notice of a breach of covenant committed by his tenant prior to the rent becoming due, was an implied waiver of the right of re-entry (*m*); but if the breach was of a continuing kind, this implied waiver did not extend to the breach which continued after the receipt (*n*). An implied waiver of this kind did not destroy the condition of re-entry (*o*); but an actual waiver had this effect. Few landlords therefore were disposed to give an actual waiver. The inconvenience which thus arose is now met by a subsequent Act (*p*), which provides that, where any actual waiver of the benefit of any covenant or condition in any lease on the part of the lessor, or his heirs, executors, administrators, or assigns, shall be proved to have taken place, after the passing of that Act (*q*), in any one particular instance, such actual waiver shall not be assumed or deemed to extend to any instance, or any breach of covenant or condition, other than that to which such waiver shall specially relate, nor to be a general waiver of the benefit of any such covenant or condition, unless an intention to that effect shall appear.

Waiver of a breach of covenant.

Implied waiver.
Continuing breach.

Actual waiver.

Formerly a grantee of the reversion of part of the property comprised in a lease could not take advantage

Severance of reversion.

(*l*) Sect. 2.

(*o*) *Doe d. Flower v. Peck*, 1

(*m*) Co. Litt. 211 b; *Price v.*

B. & Adol. 428.

Worwood, 4 H. & N. 512.

(*p*) Stat. 23 & 24 Vict. c. 38,

(*n*) *Doe d. Muston v. Gladwin*,

s. 6.

6 Q. B. 953; *Doe d. Baker v.*

(*q*) 23rd July, 1860.

Jones, 5 Ex. Rep. 498.

of a condition of re-entry or other condition contained in the lease ; as if a lease had been made of three acres, reserving a rent upon condition, and the reversion of two acres were granted, the rent might be apportioned but the condition was destroyed, "for that it is entire and against common right" (*r*). The law on this point was altered by the statute commonly called "Lord St. Leonards' Act," which enacts (*s*), that where the reversion upon a lease is severed, and the rent or other reservation is legally apportioned, the assignee of each part of the reversion shall, in respect of the apportioned rent or other reservation allotted or belonging to him, have and be entitled to the benefit of all conditions or powers of re-entry for non-payment of the original rent or other reservation, in like manner as if such conditions or powers had been reserved to him as incident to his part of the reversion in respect of the apportioned rent or other reservation allotted or belonging to him. It will be observed that this enactment applies only to conditions of re-entry on non-payment of rent, and does not affect conditions of re-entry on breach of covenants ; also, that it can only take effect, if the rent be legally apportioned. Rent can only be legally apportioned by the consent of the tenant to the apportionment, or by the verdict of a jury (*t*). With regard to leases made after the 31st December, 1881, further alterations have been made in the law on this point by the Conveyancing and Law of Property Act, 1881 (*u*). For besides the provisions contained in the 10th and 11th sections already stated (*x*), it is enacted by the 12th section that notwithstanding the severance by conveyance, sur-

Leases made
after the 31st
Dec. 1881.

(*r*) Co. Litt. 215 a. See as to coparceners, *Doe d. De Rutzen v. Lewis*, 5 A. & E. 277.

(*s*) Stat. 22 & 23 Vict. c. 35, s. 3.

(*t*) *Bliss v. Collins*, 5 B. & A. 876 ; see ante, pp. 391, 392.

(*u*) Stat. 44 & 45 Vict. c. 41, s. 12 ; see Williams's Conveyancing Statutes, 112.

Ante, p. 464.

render, or otherwise, of the reversionary estate in any land comprised in a lease, and notwithstanding the avoidance or cesser in any other manner of the term granted by a lease as to part only of the land comprised therein, *every condition or right of re-entry, and every other condition*, contained in the lease, shall be apportioned, and shall remain annexed to the several parts of the reversionary estate as severed, and shall be in force with respect to the term whereon each several part is reversionary, or the term in any land which has not been surrendered, or as to which the term has not been avoided or has not otherwise ceased, in like manner as if the land comprised in each several part, or the land as to which the term remains subsisting, as the case may be, had alone originally been comprised in the lease. It will be seen that the effect of above enactments is not restricted to conditions of re-entry on non-payment of rent.

A condition of re-entry was, evidently, a very serious instrument of oppression in the hands of the landlord, when the property comprised in the lease was valuable and the tenant by mere inadvertence might have committed some breach of covenant. To forget to pay the annual premium on the insurance of the premises against fire might thus have occasioned the loss of the whole property; although, on the other hand, the landlord might well have considered such forgetfulness inexcusable, since it might have ended in the loss of the premises by fire whilst uninsured. By Lord St. Leonards' Act (*y*), power was given to the Court, under certain conditions, to relieve against a forfeiture for breach of a covenant or condition to insure against fire. But these provisions are now repealed (*z*): and

As to fire insurance.

(*y*) Stat. 22 & 23 Vict. c. 35, ss. 4—6. See also ss. 7, 8.

(*z*) Stat. 44 & 45 Vict. c. 41, s. 14, subs. 7.

the law, with regard to re-entry and forfeiture, under a proviso in a lease, on breach of covenants, is placed on an entirely new footing by the 14th section of the Conveyancing and Law of Property Act, 1881 (*a*). This section applies to leases made either before or after the commencement of the Act, and has effect notwithstanding any stipulation to the contrary (*b*). But it does not affect the law relating to re-entry or forfeiture, or relief in case of non-payment of rent (*c*): nor does it extend (i) to a covenant or condition against the assigning, under-letting, parting with the possession, or disposing of the land leased; or to a condition for forfeiture on the bankruptcy of the lessee, or on the taking in execution of the lessee's interest; or (ii) in the case of a mining lease, to a covenant or condition for allowing the lessor to have access to or inspect books, accounts, records, weighing-machines or other things, or to enter or inspect the mine or the workings thereof (*d*).

The principal provisions of this section are as follows:—

(Sub-sect. 1.) A right of re-entry or forfeiture under any proviso or stipulation in a lease for a breach of any covenant or condition in the lease, shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of, and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and, in any case, requiring the lessee to make compensation in money for the breach, and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to

(*a*) Stat. 44 & 45 Vict. c. 41;
see Williams's Conveyancing Sta-
tutes, 114—119.

(*b*) Sect. 14, subs. 9.

(*c*) Sect. 14, subs. 8; ante,
pp. 294—296, 465.

(*d*) Sect. 14, subs. 6. See sect.
2 (xi, xv).

make reasonable compensation in money to the satisfaction of the lessor for the breach (*e*).

(Sub-sect. 2.) Where a lessor is proceeding, by action or otherwise, to enforce such a right of re-entry or forfeiture, the lessee may, in the lessor's action, if any, or in any action brought by himself, apply to the Court for relief; and the Court may grant or refuse relief, as the Court, having regard to the proceedings and conduct of the parties under the foregoing provisions of this section, and to all the other circumstances, thinks fit; and, in case of relief, may grant it on such terms, if any, as to costs, expenses, damages, compensation, penalty or otherwise, including the granting of an injunction to restrain any like breach in the future, as the Court, in the circumstances of each case, thinks fit.

(Sub-sect. 3.) For the purposes of this section a lease includes an original or derivative under-lease, also a grant at a fee farm rent (*f*), or securing a rent by condition; and a lessee includes an original or derivative under-lessee, and the heirs, executors, administrators and assigns of a lessee, also a grantee under such a grant as aforesaid, his heirs and assigns; and a lessor includes an original or derivative under-lessor, and the heirs, executors, administrators and assigns of a lessor, also a grantor as aforesaid, and his heirs and assigns.

(Sub-sect. 4.) This section applies, although the proviso or stipulation under which the right of re-entry or

(*e*) See *North London Freehold Land and House Co. v. Jacques*, 49 L. T. 659.

(*f*) The exact meaning of the term **fee farm rent* has been the subject of controversy. See Co. Litt. 143 b, and Mr. Hargrave's note (5); 2 Inst. 44; 2 Black. Com. 43, and the notes to *Bradbury v. Wright*, 2 Dougl. 624. The

better opinion appears to be that a fee farm rent means a perpetual rent, and that the term may be applied to a rent-charge in fee simple, which is the only way in which a perpetual rent can be created since the statute of *Quia Emptores*, 18 Edw. I. c. 1. See ante, pp. 143, 144, 389, 390.

* Fee farm

forfeiture accrues is inserted in the lease in pursuance of the directions of any Act of Parliament.

(Sub-sect. 5.) For the purposes of this section a lease limited to continue as long only as the lessee abstains from committing a breach of covenant, shall be and take effect as a lease to continue for any longer term for which it could subsist, but determinable by a proviso for re-entry on such a breach.

Statute of
Frauds
required
writing to
assign a lease.

It was provided by the Statute of Frauds (*g*), that no leases, estates or interests, not being copyhold or customary interests, in any lands, tenements or hereditaments, should be assigned, unless by deed or note in writing, signed by the party so assigning, or his agent thereunto lawfully authorized by writing, or by act or operation of law. And now, by the Act to amend the law of real property (*h*), it is enacted that an assignment of a chattel interest, not being copyhold, in any tenements or hereditaments, shall be void at law unless made by deed (*i*).

A deed now
required.

Will of
leaseholds.

Leasehold estates may also be bequeathed by will. As leaseholds are personal property, they devolve in the first place on the executors of the will, in the same manner as other personal property; or, on the decease of their owner intestate, they will pass to his administrator. An explanation of this part of the subject will be found in the author's treatise on the principles of the law of personal property (*k*). It was formerly a rule that where a man had lands in fee simple, and also lands held for a term of years, and devised by his will

General
devise.

(*g*) 29 Car. II. c. 3, s. 3.

(*h*) Stat. 8 & 9 Vict. c. 106, s. 3, repealing stat. 7 & 8 Vict. c. 76, s. 3, to the same effect.

(*i*) Any assignment of a lease upon any other occasion than a

sale or mortgage appears now to be subject to a deed stamp of 10s. Stat. 33 & 34 Vict. c. 97.

(*k*) Part IV. Chaps. 3 & 4, pp. 505, 550, 12th ed.

all his lands and tenements, the fee simple lands only passed by the will, and not the leaseholds; but if he had leasehold lands, and none held in fee simple, the would then pass, for otherwise the will would void (l). But the Act for the amendment of Wills Act.

the laws with respect to wills (m) now provides, that a devise of the land of the testator, or of the land of the testator in any place, or in the occupation of any person mentioned in his will, or otherwise described in a general manner, and any other general devise which would describe a leasehold estate if the testator had no freehold estate which could be described by it, shall be construed to include the leasehold estates of the testator, or his leasehold estates to which such description shall extend, as well as freehold estates, unless a contrary intention shall appear by the will. The Act to which we have already referred (n) contains a provision for the exoneration of the executors or administrators of a lessee from liability to the rents and covenants of the lease, similar to that to which we have already referred with respect to their liability to rents-charge in conveyances on rents-charge (o). Exoneration of executors and administrators of lessee.

Leasehold estates are also subject to involuntary Debts. alienation for the payment of debts. By the Act for Judgments. extending the remedies of creditors against the property of their debtors, they became subject, in the same manner as freeholds, to the claims of judgment creditors (p): with this exception, that, as against purchasers without notice of any judgments, such judgments had no further

(l) *Rose v. Bartlett*, Cro. Car. 292.

(m) Stat. 7 Will. IV. & 1 Vict. c. 26, s. 26. See *Wilson v. Eden*, 5 Exch. 752; 18 Q. B. 474; 16 Beav. 153; *Prescott v. Barker*, L. R., 9 Ch. 174.

(n) Stat. 22 & 23 Vict. c. 35, s. 27.

(o) Ante, p. 393; *Re Green*, 2 De Gex, F. & J. 121. See *Williams on Personal Property*, pp. 534, 535, 553, 12th ed.

(p) Stat. 1 & 2 Vict. c. 110; ante, p. 110.

effect than they would have had under the old law (*q*). And, under the old law, leasehold estates, being goods or chattels merely, were not bound by judgments until a writ of execution was actually in the hands of the sheriff or his officer (*r*). So that a judgment had no effect as against a purchaser of a leasehold estate without notice, unless a writ of execution on such judgment had actually issued prior to the purchase. And if leaseholds should be considered to be "goods" within the meaning of the Mercantile Law Amendment Act, 1856 (*s*), then a purchaser without notice was safe at any time before an actual seizure under the writ. And now, as we have seen, no judgment of a date later than the 29th of July, 1864, can affect any land of whatever tenure, until such land shall have been actually delivered in execution by virtue of a writ of *elegit* or other lawful authority in pursuance of such judgment (*t*).

Bankruptcy.

Under the Bankruptcy Act, 1883 (*u*), when a debtor is adjudged bankrupt, his property vests in the trustee

(*q*) Stat. 2 & 3 Vict. c. 11, s. 5; *Westbrook v. Blythe*, Q. B., 1 Jurist, N. S. 85; 3 E. & B. 737.

(*r*) Stat. 29 Car. II. c. 3, s. 16. See Principles of the Law of Personal Property, p. 69, 11th ed.; 82, 12th ed.

(*s*) Stat. 19 & 20 Vict. c. 97, s. 1.

(*t*) Stat. 27 & 28 Vict. c. 112; ante, p. 112.

(*u*) Stat. 46 & 47 Vict. c. 52, ss. 20, 44, 54, 168. As to the disclaimer of a lease by a trustee in bankruptcy under the Bankruptcy Act, 1869, see stat. 32 & 33 Vict. c. 71, s. 23; General Rules in Bankruptcy, 1871, rule 28; *Smyth v. North*, 20 W. R.

683; L. R., 7 Ex. 242; *Reed v. Harvey*, 5 Q. B. D. 184; *Wilson v. Wallani*, 5 Ex. D. 155; *Lowrey v. Barker*, ib. 170; *Smalley v. Harding*, 7 Q. B. D. 524; *Ex parte Ladbury*, 17 Ch. D. 532; *Ex parte Walton*, ib. 746; *Ex parte Glegg*, 19 Ch. D. 7; *Titterton v. Cooper*, 9 Q. B. D. 473; *Ex parte Isherwood*, 22 Ch. D. 384; *Ex parte Izard*, 23 Ch. D. 115; *Ex parte Arnal*, 24 Ch. D. 26; *Hill v. East and West India Dock Co.*, 9 App. Cas. 448. As to the previous law, see stats. 12 & 13 Vict. c. 106, s. 145; 6 Geo. IV. c. 16, s. 75; *Briggs v. Sowry*, 8 M. & W. 729.

for the purposes of the Act (x). But the trustee may, within the time and under the conditions specified in the Act (y), by writing signed by him disclaim any part of the property of the bankrupt which consists of land of any tenure burdened with onerous covenants,* or of any other property that is unsaleable, or not readily saleable, by reason of its binding the possessor thereof to the performance of any onerous act, or to the payment of any sum of money. Such a disclaimer operates to determine, as from the date of disclaimer, the rights, interests, and liabilities, of the bankrupt and his property in or in respect of the property disclaimed, and also discharges the trustee from all personal liability in respect of the property disclaimed as from the date when the property vested in him, but does not, except so far as is necessary for the purpose of releasing the bankrupt and his property and the trustee from liability, affect the rights or liabilities of any other person (z). But the trustee is not entitled to disclaim a lease without the leave of the Court, except in any cases which may be prescribed by general rules (a), and the Court may, before or on

Disclaimer of
leasehold
trustee in
bankruptcy.

(x) See Williams on Personal Property, pp. 224, 225, 232—234, 12th ed.

(y) See stat. 46 & 47 Vict. c. 52, s. 55, subss. 1, 4; Williams on Personal Property, pp. 234, 235, 12th ed.

(z) Sect. 55, subs. 2. By subs. 7, any person injured by the operation of such a disclaimer shall be deemed to be a creditor of the bankrupt to the extent of the injury, and may prove the same as a debt under the bankruptcy.

(a) By the Bankruptcy Rules, 1883 (r. 232), a lease may be disclaimed without the leave of the Court in any of the following cases, namely, where the bankrupt has not sublet or assigned the lease or created any mortgage or charge thereon; and (1) the rent reserved and real value of the property leased, as ascertained by property tax assessment, are less than 20*l.* per annum; or (2) the estate is administered under the provisions of sect. 121 of the Act; or (3) *the trustee serves the lessor with notice of his intention to disclaim, and the lessor does not within seven days after the receipt of such notice give notice to the trustee requiring the matter to be brought before the Court. Except as provided by this rule the disclaimer of a lease without the leave of the*

granting such leave, require such notices to be given to persons interested, and impose such terms as a condition of granting leave, and make such orders with respect to fixtures, tenant's improvements, and other matters arising out of the tenancy as the Court thinks just (a). The Court may, on application by any person either claiming any interest in any disclaimed property, or under any liability not discharged by this Act in respect of any disclaimed property, and on hearing such persons as it thinks fit, make an order for the vesting of the property in or delivery thereof to any person entitled thereto, or to whom it may seem just that the same should be delivered by way of compensation for such liability as aforesaid, or a trustee for him, and on such terms as the Court thinks just; and on any such vesting order being made, the property comprised therein shall vest accordingly in the person therein named in that behalf without any conveyance or assignment for the purpose. Provided always, that where the property disclaimed is of a leasehold nature, the Court shall not make a vesting order in favour of any person claiming under the bankrupt, whether as underlessee or as mortgagee by demise, except upon the terms of making such person subject to the same liabilities and obligations as the bankrupt was subject to under the lease in respect of the property at the date when the bankruptcy petition was filed, and any mortgagee or underlessee declining to accept a vesting order upon such terms shall be excluded from all interest in and security upon the property, and if there shall be no person claiming under the bankrupt who is willing to accept an order upon such terms, the Court shall have power to vest the bankrupt's estate and interest in the property in any

Court is void. [Sect. 121 provides for the summary administration of estates not likely to exceed 300*l.* in value; see Williams on Personal Property, pp. 277—279, 12th ed.]

(a) Sect. 55, subs. 3.

person liable either personally or in a representative character, and either alone or jointly with the bankrupt to perform the lessee's covenants in such lease, freed and discharged from all estates, incumbrances, and interests created therein by the bankrupt (*b*).

The tenant for a term of years may, unless restrained by express covenant, make an underlease for any part of his term; and any assignment for less than the whole term is in effect an underlease (*c*). On the other hand, any assurance purporting to be an underlease, but which comprises the whole term, is, by the better opinion, in effect an assignment (*d*). It is true that in some cases, where a tenant for years, having less than three years of his term to run, has verbally agreed with another person to transfer the occupation of the premises to him for the rest of the term, he paying an equivalent rent, this has been regarded as an underlease, and so valid (*e*), rather than as an attempted assignment which would be void, formerly for want of a writing (*f*), and now for want of a deed (*g*). It is, however, held that no distress can be made for the rent thus reserved (*h*). But if a tenure be created, the lord, if he have no estate, must at least have a seignory (*i*), to which the rent would by law be incident; and being thus rent service, it must by the common law be enforceable by distress (*k*).

Underlease.

Underlease
for the whole
term.No distress
can be made.

Sect. 55, subs. 6.

(*c*) See Sugd. Concise Vendors, 482; *Cottes v. Richardson*, 7 Ex. Rep. 143.

(*d*) *Palmer v. Edwards*, 1 Doug. 187, n.; *Parmenter v. Webber*, 8 Taunt. 593; 2 Prest. Conv. 124; *Thorn v. Woolcombe*, 3 B. & Adol. 586; *Langford v. Selmes*, 3 K. & J. 220, 227; *Beaumont v. Marquis of Salisbury*, 19 Beav. 198, 210; *Beardman v. Wilson*, L. R., 4 C. P. 57.

(*e*) *Poultney v. Holmes*, 1 Strange, 405; *Preece v. Corrie*, 5 Bing. 27; *Pollock v. Stacy*, 9 Q. B. 1033.

(*f*) Stat. 29 Car. II. c. 3, s. 3; ante, p. 472.

(*g*) Stat. 8 & 9 Vict. c. 106, s. 3; ante, p. 472.

(*h*) Bac. Abr. tit. Distress (A); ——— v. *Cooper*, 2 Wilson, 375; *Preece v. Corrie*, 5 Bing. 24; v. *Puscos*, 3 Bing. N. C.

(*i*) Ante, p. 382.

(*k*) Litt. sect. 213.

The very fact, therefore, that no distress can be made for the rent by the common law, shows that there can be no tenure between the parties. And, if so, the attempted disposition cannot operate as an underlease (*l*). If, however, the disposition be by deed, and be executed by the alienee, it has been decided that the reservation of rent may operate to create a rent-charge (*m*), for which the owner may sue (*n*), and which he may assign, so as to entitle the assignee to sue in his own name (*o*). And if this be so, there seems no good reason why, under these circumstances, the statutory power of distress given to the owner of a rent seck (*p*), should not apply to the rent thus created (*q*). But on this point also opinions differ (*r*). It is conceived that, if such a rent be created by an instrument coming into operation after the 31st December, 1881, it may be recovered by means of the remedies conferred by the 44th section of the Conveyancing and Law of Property Act, 1881

No privity
between the
the
underlessee.

Every underlessee becomes tenant to the lessee who grants the underlease, and not tenant to the original lessor. Between him and the underlessee, no *privity* is said to exist. Thus the original lessor cannot maintain any action against an underlessee for any breach of the covenants contained in the original lease (*t*). His remedy is only against the lessee, or any assignee from him of the whole term. The derivative term, which is

Derivative

(*l*) *Barrett v. Rolph*, 14 M. & W. 348, 352.

(*m*) *Ante*, p. 383.

(*n*) *Baker v. Gostling*, 1 Bing. N. C. 19.

(*o*) *Williams v. Hayward*, Q. B., 5 Jur., N. S. 1417; 1 Ellis & Ellis, 1040.

(*p*) Stat. 4 Geo. II. c. 28, s. 5; *ante*, pp. 382, 383, 386.

(*q*) *Pascoe v. Pascoe*, 3 Bing. N. C. 905.

(*r*) See — *v. Cooper*, 2 Wils. 375; *Langford v. Selmes*, 3 K. & J. 220; *Smith v. Watts*, 4 Drew. 338; *Wills v. Cattling*, Q. B., 7 W. R. 448; *Burton's Compendium*, pl. 1111.

(*s*) Stat. 44 & 45 Vict. c. 41; *ante*, p. 387; see *Williams's Conveyancing Statutes*, 216, 217.

(*t*) *Holford v. Hatch*, 1 Dougl. 183.

vested in the underlessee, is not an estate in the interest originally granted to the lessee : it is a new and distinct term, for a different, because a less, period of time. It certainly arises and takes effect out of the original term, and its existence depends on the continuance of such term, but still, when created, it is a distinct chattel, in the same way as a portion of any moveable piece of goods becomes, when cut out of it, a separate chattel personal.

term is not an estate in original term.

By the common law, if a married woman were possessed of a term of years, her husband might dispose of it at any time during the coverture, either absolutely or by way of mortgage (*u*) ; and if he survived her, he became entitled to it by his marital right (*x*). But if he died in her lifetime, it survived to her, and his will alone was not sufficient to deprive her of it (*y*). And if a trustee were possessed of a term of years on trust for a married woman, equity gave her husband similar rights over her equitable interest therein (*z*) ; subject however to the assertion by the wife of her equity to a settlement, or right to have a provision secured for herself and her children by settlement of the rents and profits of the term, or part thereof, on trust for that purpose (*a*). But if the trust were for the wife's separate use, she was entitled to enjoy and dispose of her interest as fully as if she were a feme sole (*b*). And

Husband's right wife' common law

Wife's equitable interest in a

Wife's equity to a settlement.

(*u*) *Hill v. Edmonds*, 5 De Gex & S. 603, 607.

(*x*) Co. Litt. 46 b, 351 a ; see ante, pp. 266, 267 ; Williams's Conveyancing Statutes, 374, 375, 452.

(*y*) 2 Black. Com. 434 ; 1 Rep. Husb. & Wife, 173, 177 ; *Doe d. Shaw v. Steward*, 1 Ad. & Ell. 300.

(*z*) *Donne v. Hart*, 2 R. & M. 360 ; *Re Bellamy*, *Elder v. Pearson*,

25 Ch. D. 620 ; see *Duberly v. Day*, 16 Beav. 33 ; 16 Jur. 581.

(*a*) *Hanson v. Keating*, 4 Hare, 1 ; see Williams on Personal Property, pp. 576—579.

(*b*) See ante, pp. 267—269. The Married Women's Property Act, 1870 (stat. 33 & 34 Vict. c. 93, s. 7, now repealed, see ante, p. 270), provided that, where any woman married after the passing of the Act (9th Aug.

now, if a term of years or any equitable interest therein belong to a married woman as her separate property by virtue of the Married Women's Property Act, 1882, she will be entitled to hold and dispose of the same in the same manner as if she were a feme sole (*c*).

Renewable
leases.

Surrender in
law.

In many cases landlords, particularly corporations, are in the habit of granting to their tenants fresh leases, either before or on the expiration of existing ones. In other cases a covenant is inserted to renew the lease on payment of a certain fine for renewal; and this covenant may be so worded as to confer on the lessee a perpetual right of renewal from time to time as each successive lease expires (*d*). In all these cases the acceptance by the tenant of the new lease operates as a surrender in law of the unexpired residue of the old term; for the tenant by accepting the new lease affirms that his lessor has power to grant it; and as the lessor could not do this during the continuance of the old term, the acceptance of such new lease is a surrender in law of the former. But if the new lease be void, the surrender of the old one will be void also; and if the new lease be voidable, the surrender will be void if the new lease fail (*e*). It appears to be now settled, after much difference of opinion, that the granting of a new lease to another person with the

(70) should during her marriage be entitled to any personal property (which would seem to include leaseholds) as next of kin or one of the next of kin of an intestate, such property should, subject and without prejudice to the trusts of any settlement affecting the same, belong to the woman for her separate use. See Williams's Conveyancing Statutes, 378, 382.

(*c*) Stat. 45 & 46 Vict. c. 75,

ss. 1 (subs. 1), 2, 5; ante, pp. 270, 271; see Williams's Conveyancing Statutes, 382, 383, 418, 421.

(*d*) *Iggulden v. May*, 9 Ves. 325; 7 East, 237; *Hare v. Burges* 4 K. & J. 45.

(*e*) *Ire's case*, 5 Rep. 11 b; *Rowd. Earl of Berkeley v. Archbishop of York*, 6 East, 86; *Doe d. Earl of Egremont v. Courtenay*, 11 Q. B. 702; *Doe d. Biddulph v. Poole*, 1 Q. B. 713.

consent of the tenant is an implied surrender of the old term (*f*). Whenever a lease, renewable either by favour or of right, is settled in trust for one person for life with remainders over, or in any other manner, the benefit of the expectation or right of renewal belongs to the persons from time to time beneficially interested in the lease: and if any other person should, on the strength of the old lease, obtain a new one, he will be regarded in equity as a trustee for the persons beneficially interested in the old one (*g*). So the costs of renewal are divided between the tenant for life and remaindermen according to their respective periods of actual enjoyment of the new lease (*h*). Special provisions have been made by Parliament for facilitating the procuring and granting of renewals of leases when any of the parties are infants, idiots or lunatics (*i*). And the provision by which the remedies against under-tenants have been preserved, when leases are surrendered in order to be renewed, has been already mentioned (*k*). A statute of the year 1860 (*l*)

(*f*) See *Lyon v. Reed*, 13 Mee. & Wels. 285, 306; *Creagh v. Blood*, 3 Jones & Lat. 133, 160; *Nickells v. Atherstone*, 10 Q. B. 944; *M'Donnell v. Pope*, 9 Hare, 705; *Davison v. Gent*, 1 H. & N. 714.

(*g*) *Rawe v. Chichester*, Ambl. 715; *Giddings v. Giddings*, 3 Russ. 241; *Tanner v. Elworthy*, 4 Beav. 487; *Clegg v. Fishwick*, 1 Mac. & Gord. 294.

(*h*) *White v. White*, 5 Ves. 554; 9 Ves. 560; *Allan v. Buckhouse*, 2 Ves. & Bea. 65; Jacob, 631; *Greenwood v. Evans*, 4 Beav. 44; *Jones v. Jones*, 5 Hare, 440; *Hadleston v. Whelpdale*, 9 Hare, 775; *Ainslie v. Harcourt*, 28 Beav. 313; *Bradford v. Brownjohn*, L. R., 3 Ch. 711.

W.R.P.

(*i*) Stat. 11 Geo. IV. & 1 Will. IV. c. 65, ss. 12, 14—18, 20, 21; 16 & 17 Vict. c. 70, ss. 113—115, 133—135.

(*k*) Stat. 4 Geo. II. c. 28, s. 6; ante, p. 298.

(*l*) Stat. 23 & 24 Vict. c. 124. An Act of the same year (stat. 23 & 24 Vict. c. 145, see ss. 8, 9, 34), contained provisions enabling trustees of renewable leaseholds to renew their leases and to raise money by mortgage for that purpose. These provisions applied only to instruments executed after the passing of Act (28th Aug. 1860), and were repealed as from the commencement of the year 1883 by stat. 45 & 46 Vict. c. 38, s. 64.

has made provision for facilitating the purchase by trustees of renewable leaseholds of the reversion of the land, when it belongs to an ecclesiastical corporation, and for raising money for that purpose by sale or mortgage (*m*); also for the exchange of part of the lands, comprised in any renewable lease, for the reversion in other part of the same lands, so as thus to acquire the entire fee simple in a part of the lands instead of a renewable lease of the whole (*n*). As we have seen, capital money arising under the Settled Land Act, 1882, may be applied in purchase of the reversion or freehold in fee of any settled leasehold land; and the tenant for life now has power to exchange any part of the settled land for other land (*o*).

Compensation
to tenants for
their im-
provements.

Before the year 1876 the tenant of an agricultural holding had no right to exact compensation from his landlord for any improvements (*p*) which he might have made during his tenancy; except under an express agreement with the landlord or by virtue of the custom of the country where the holding lay (*q*). The Agricultural Holdings (England) Act, 1875 (*r*), made provision for the compensation of tenants, whose tenancies were within the Act, for improvements made by them. But the operation of this Act might be excluded by agreement between landlord and tenant (*s*); and in practice this was usually done. The Act was repealed

(*m*) Stat. 23 & 24 Vict. c. 124, ss. 35—38.

(*n*) Sect. 39.

(*o*) Ante, pp. 49, 50.

(*p*) As to the removal of buildings and fixtures erected by a tenant for agricultural purposes, see Williams on Personal Property, 15—19, 12th ed.

(*q*) See *Hutton v. Warren*, 1 M. & W. 466; notes to *Wigglesworth v. Dallison*, 1 Smith, L. C. 594, 602—606, 8th ed.; Woodfall on

Landlord and Tenant, ch. xx., sects. 4, 5, pp. 724, 736, 12th ed.; *Bradburn v. Foley*, 3 C. P. D. 129, 134.

(*r*) Stat. 38 & 39 Vict. c. 92, which commenced immediately after the 14th Feb. 1876, see ante, p. 457, n. (*n*). This Act was amended by stat. 39 & 40 Vict. c. 74.

(*s*) See stat. 38 & 39 Vict. c. 92, ss. 54—57.

by the Agricultural Holdings (England) Act, 1883 (*t*), which came into force on the 1st of January, 1884 (*u*). Under the Act of 1883 (*r*), where the tenant (*x*) of a holding, to which the Act applies (*y*), has made thereon after the commencement of the Act (*z*) any improvement of the kind specified in the Act, he is entitled on quitting his holding at the determination of his tenancy to obtain from the landlord as compensation under this Act for such improvement such sum as fairly represents the value of the improvement to an incoming tenant. The amount and mode and time of payment of compensation to be paid under this Act may be settled by agreement between the landlord and the tenant. But if they do not agree the difference is to be settled by a reference (*a*) to arbitration in the manner prescribed by the Act (*b*). Where the sum claimed for compensation exceeds 100*l.*, either party may appeal against the award of the arbitrators to the judge of the County Court within the time and on the grounds specified in the Act; and the decision of the County Court judge on appeal is final, save that he may state a case on a question of law for the final decision of the High Court (*c*); and the award is not to be questioned otherwise than as provided by the Act (*d*). Compensation is not payable under this Act for the erection of buildings and other permanent improvements specified in the Act, unless executed with the consent in writing of the landlord or his agent previously obtained (*e*); or for drainage, unless the tenant has complied with the condi-

(*t*) Stat. 46 & 47 Vict. c. 61.

(*u*) Sect. 53.

(*v*) Sect. 1.

(*x*) By sect. 61, in this Act "tenant" means the holder of land under a landlord for a term of years, or for lives, or for lives and years, or from year to year.

(*y*) See sect. 54, ante, p. 457.

(*z*) See sect. 2, as to improvements executed before the commencement of the Act.

(*a*) Sect. 8.

(*b*) See ss. 9—22.

(*c*) Sect. 23.

(*d*) Sect. 22.

(*e*) Sect. 3, and First Schedule, Part I.

tions of the Act in giving to the landlord or his agent due notice of intention to execute such an improvement (*f*). But compensation may be obtained for the improvement of the land by the application of purchased manure and in other ways described in the Act, although the consent of the landlord should not have been obtained (*g*). The Act contains special provisions as to compensation for improvements begun during the last year of the tenancy (*h*). For those improvements for which compensation may be claimed under this Act, although they may have been made without the consent of or notice to the landlord, fair and reasonable compensation, payable under an agreement in writing, may be substituted for compensation under the Act (*i*). And where, in the case of a tenancy under a contract of tenancy current at the commencement of the Act (*k*), any agreement in writing, or custom, or the Act of 1875, provides specific compensation for any improvement described in the Act of 1883, compensation in respect of such improvement is to be payable in pursuance of such agreement, custom, or Act of 1875, in substitution for compensation under the Act of 1883 (*l*). But any agreement made by a tenant, by virtue of which he is deprived of his right to claim compensation under this Act in respect of any improvement described therein [except an agreement providing such compensation as by this Act permitted to be substituted for compensation under this Act] is void, both at law and in equity, so far as it deprives him of such right (*m*). A tenant is not entitled to claim compensation by custom or otherwise than in manner authorized by this Act in respect of any improvement for which he is entitled to compensation under or in pursuance of this Act: but

(*f*) Sect. 4, and First Schedule, Part II.

(*g*) See First Schedule, Part III.

(*h*) Sect. 59.

(*i*) See sect. 5.

(*k*) See s. 61.

(*l*) Sect. 5.

(*m*) Sect. 55.

where he is not entitled to compensation under or in pursuance of this Act, he may recover compensation under any other Act, or any agreement or custom, in the same manner as if this Act had not passed (*n*).

A landlord, on paying to the tenant the amount due to him in respect of compensation under this Act, or compensation authorized by this Act to be substituted therefor, or on expending such an amount as may be necessary to execute an improvement by drainage, which the landlord has undertaken to execute himself in accordance with this Act (*o*), may obtain an order from the County Court charging the holding, or any part thereof, with the repayment of the amount paid or expended with such interest and by such instalments, and with such directions for giving effect to the charge, as the Court thinks fit. But where the landlord is not absolute owner of the holding for his own benefit, no instalment or interest is to be made payable after the time when the improvement, in respect whereof compensation is paid, will, where an award has been made, be taken to have been exhausted according to the declaration of the award, and in any other case, after the time when any such improvement will in the opinion of the Court have become exhausted (*p*).

Where the landlord is a person entitled to receive the rents and profits of any holding as trustee, or in any character otherwise than for his own benefit, compensation is not recoverable by the tenant under the Act, against such landlord personally, but may be recovered by means of a charge on the holding obtained by the tenant in his own favour in the County Court (*q*). The Act also contains important provisions restricting the landlord's right to distrain on a holding to which the

Power to
charge
ing wi...
repayment.

Trustee
landlord.

Restriction
on distress.

(*n*) Sect. 57.

(*o*) See sect. 4.

(*p*) Sect. 29; see also ss. 30—

32. The Act of 1875 contained

similar provisions; see stat. 38
& 39 Vict. c. 92, s. 42.

(*q*) Sect. 31.

Tenant's
fixtures.

Act applies (r), and for the removal of tenant's fixtures, subject to the landlord's option to purchase the same (s).

Long terms
of years.

We now come to consider those long terms of years of which frequent use is made in conveyancing, generally for the purpose of securing the payment of money. For this purpose it is obviously desirable that the person who is to receive the money should have as much power as possible of realizing his security, whether by receipt of the rents or by selling or pledging the land; at the same time it is also desirable that the ownership of the land, subject to the payment of the money, should remain as much as possible in the same state as before, and that when the money is paid, the persons to whom it was due should no longer have anything to do with the property. These desirable objects are accomplished by conveyancers by means of the creation of a long term of years, say 1,000, which is vested (when the parties to be paid are numerous, or other circumstances make such a course desirable), in trustees, upon trust out of the rents and profits of the premises, or by sale or mortgage thereof for the whole or any part of the term, to raise and pay the money required, as it may become due, and upon trust to permit the owners of the land to receive the residue of the rents and profits. By this means the parties to be paid have ample security for the payment of their money. Not only have their trustees the right to receive on their behalf (if they think fit) the whole accruing income of the property, but they have also power at once to dispose of it for 1,000 years to come, a power which is evidently almost as effectual as if they were enabled to sell the fee simple. Until the time of payment comes, the owner of the land

The parties
have ample
security.

(r) Sects. 44—52; see ante, pp. 293, 457.

(s) Sect. 34; see Williams on Personal Property, 16—19, 12th ed.

is entitled, on the other hand, to receive the rents and profits, by virtue of the trust under which the trustees may be compelled to permit him so to do. So, if part of the rents should be required, the residue must be paid over to the owner; but if non-payment by the owner should render a sale necessary, the trustees will be able to assign the property, or any part of it, to any purchaser for 1,000 years without any rent. But until these measures may be enforced, the ownership of the land, subject to the payment of the money, remains in the same state as before. The trustees, to whom the term has been granted, have only a chattel interest; the legal seisin of the freehold remains with the owner, and may be conveyed by him, or devised by his will, or will descend to his heir, in the same manner as if no term existed, the term all the while still hanging over the whole, ready to deprive the owners of all substantial enjoyment, if the money should not be paid.

The ownership of the land, subject to the payment as be

If, however, the money should be paid, or should not ultimately be required, different methods may be employed of depriving the trustees of all power over the property. The first method, and that most usually adopted in modern times, is by inserting in the deed, by which the term is created, a proviso that the term shall cease, not only at its expiration by lapse of time, but also in the event of the purposes for which it is created being fully performed and satisfied, or becoming unnecessary, or incapable of taking effect (*t*). This proviso for *cesser*, as it is called, makes the term endure so long only as the purposes of the trust require; and, when these are satisfied, the term expires without any act to be done by the trustees: their title at once ceases, and they cannot, if they would, any longer intermeddle with the property.

Proviso for *cesser*.

But if a proviso for cesser of the term should not be inserted in the deed by which it is created, there is still a method of getting rid of the term, without disturbing the ownership of the lands which the term overrides. The lands in such cases, it should be observed, may not, and seldom do, belong to one owner for an estate in fee simple. The terms of which we are now speaking are most frequently created by marriage settlements, and are the means almost invariably used for securing the portions of the younger children; whilst the lands are settled on the eldest son in tail. But, on the son's coming of age, or on his marriage, the lands are, for the most part, as we have before seen (*u*), resettled on him for life only, with an estate tail in remainder to his unborn eldest son. The owner of the lands is therefore probably only a tenant for life, or perhaps a tenant in tail. But, whether the estate be a fee simple, or an estate tail, or for life only, each of these estates is, as we have seen, an estate of freehold (*x*), and, as such, is larger, in contemplation of law, than any term of years, however long. The consequence of this legal doctrine is, that if any of these estates should happen to be vested in any person, who at the same time is possessed of a term of years in the same land, and no other estate should intervene, the estate of freehold will infallibly swallow up the term, and yet be not a bit the larger.

Terms are por- The term will, as it is said, be *merged* in the estate of freehold (*y*). Thus, let A. and B. be tenants for a term of 1,000 years, and subject to that term let C. be tenant for his life; if now A. and B. should assign their term to C. (which assignment under such circumstances is called a *surrender*), C. will still be merely tenant for life as before. The term will be gone for ever; yet C. will have no right to make any disposition to endure

Any estate of freehold is a larger estate than a term of years.

Merger of the term.

Surrender.

(*u*) Ante, p. 72.(*x*) Ante, pp. 28, 58, 83.(*y*) 3 Prest. Conv. 219. See ante, pp. 298, 330.

beyond his own life. He had the legal seisin of the lands before, though A. and B. had the possession by virtue of their term ; now, he will have both legal seisin and actual possession during his life, and A. and B. will have completely given up all their interest in the premises. Accordingly, if A. and B. should be trustees for the purposes we have mentioned, a surrender by them of their term to the legal owner of the land, will bring back the ownership to the same state as before. The Act to amend the law of real property (z) now provides that a surrender in writing of an interest in any tenements or hereditaments, not being a copyhold interest, and not being an interest which might by law have been created without writing, shall be void at law unless made by deed.

Surrenders
now to be by
deed.

The merger of a term of years is sometimes occasioned by the accidental union of the term and the immediate freehold in one and the same person. Thus, if the trustee of the term should purchase the freehold, or if it should be left to him by the will of the former owner, or descend to him as heir at law, in each of these cases the term will merge. So if one of two joint holders of a term obtain the immediate freehold, his moiety of the term will merge : or conversely if the sole owner of a term obtain the immediate freehold jointly with another, one moiety of the term will merge, and the joint ownership of the freehold will continue, subject only to the remaining moiety of the term (a). Merger being a *legal* incident of estates, formerly occurred quite irrespectively of the trusts on which they were held ; but equity did its utmost to prevent any injury

Accidental
merger.

(z) Stat. 8 & 9 Vict. c. 106, s. 3,
repealing stat. 7 & 8 Vict. c. 76,
s. 4, to the same effect.

(a) *Sir Ralph Bovey's case*, 1
Ventr. 193, 195 ; Co. Litt. 186 a ;
Burton's Compendium, pl. 900.

Estates held
in autre droit.

being sustained by a cestui que trust, the estate of whose trustee might accidentally have merged (*b*). The Supreme Court of Judicature Act, 1873 (*c*), however, provides (*d*) that there shall not, after the commencement of that Act, which took place on the 1st of November, 1875 (*e*), be any merger by operation of law only of any estate, the beneficial interest in which would not be deemed to be merged or extinguished in equity. The law, though it did not recognize the trusts of equity, yet took notice in some few cases of property being held by one person in right of another, or *in autre droit*, as it is called; and in these cases the general rule was, that the union of the term with the immediate freehold would not cause any merger, if such union were occasioned by the act of law, and not by the act of the party. Thus, if a term were held by a person, to whose wife the immediate freehold afterwards came by descent or devise, such freehold, coming to the husband in right of his wife, would not have caused a merger of the term (*f*). So, if the owner of a term made the freeholder his executor, the term would not have merged (*g*); for the executor is recognized by the law as usually holding only for the benefit of creditors and legatees; but if the executor himself should be the legatee of the term, it seems that, after all the creditors have been paid, the term will still merge (*h*). And if an executor, whether legatee or not, holding a term as executor, should *purchase* the immediate freehold, the better opinion is, that this being his own act, will occasion the merger

(*b*) See 3 Prest. Conv. 320, 321; 5 H. & N. 766; 7 H. & N. 507.
Chambers v. Kingham, 10 Ch. D. 743. (*g*) Co. Litt. 338 b.

(*c*) Stat. 36 & 37 Vict. c. 66.

(*d*) Sect. 25, subs. (4).

(*e*) Stat. 37 & 38 Vict. c. 83.

(*f*) *Doe d. Blight v. Pett*, 11 Adol. & Ellis, 842; *Jones v.*

(*h*) 3 Prest. Conv. 310, 311.
 See *Law v. Urlwin*, 16 Sim. 377,
 and Lord St. Leonards' comments
 on this case, Sugd. V. & P. 507,
 13th ed.

of the term, except so far as respects the rights of the creditors of the testator (i).

There was until recently another method of disposing of a term when the purposes for which it was created had been accomplished. If it were not destroyed by a proviso for cesser, or by a merger in the freehold, it might have been kept on foot for the benefit of the owner of the property for the time being. A term, as we have seen, is an instrument of great power, yet easily managed; and in case of a sale of the property, it might have been a great protection to the purchaser. Suppose, therefore, that, after the creation of such a term as we have spoken of, the whole property had been sold. The purchaser, in this case, often preferred having the term still kept on foot, and assigned by the trustees to a new trustee of his own choosing, in trust for himself, his heirs and assigns; or, as it was technically said, *in trust to attend the inheritance*. The reason for this proceeding was that the former owner might, possibly, since the commencement of the term, have created some incumbrance upon the property, of which the purchaser was ignorant, and against which, if existing, he was of course desirous of being protected. Suppose, for instance, that a rent-charge had been granted to be issuing out of the lands, subsequently to the creation of the term: this rent-charge of course could not affect the term itself, but was binding only on the freehold, subject to the term. The purchaser, therefore, if he took no notice of the term, bought an estate, subject not only to the term, but also to the rent-charge. Of the existence of the term, however, we suppose him to have been aware. If now he should have procured the term to be surrendered to himself, the unknown rent-charge, not being any estate in the land, would not

The term

foot.

in trust to
attend the
inheritance.

Case of a

Consequence

(i) Sugd. Vend. & Pur. 505, 13th ed.

The term
should have
been assigned
to attend the
inheritance.

have prevented the union and merger of the term in the freehold. The term would consequently have been destroyed, and the purchaser would have been left without any protection against the rent-charge, of the existence of which he had no knowledge, nor any means of obtaining information. The rent-charge, by this means, became a charge, not only on the legal seisin, but also on the possession of the lands, and was said to be accelerated by the merger of the term (*k*). The preferable method, therefore, always was to avoid any merger of the term; but on the contrary, to obtain an assignment of it to a trustee in trust for the purchaser, his heirs and assigns, and to attend the inheritance. The trustee thus became possessed of the lands for the term of 1,000 years; but he was bound, by virtue of the trust, to allow the purchaser to receive the rents, and exercise what acts of ownership he might please. If, however, any unknown incumbrance, such as the rent-charge in the case supposed, should have come to light, then was the time to bring the term into action. If the rent-charge should have been claimed, the trustee of the term would at once have interfered, and informed the claimant that, as his rent-charge was made subsequently to the term, he must wait for it till the term was over, which was in effect a postponement *sine die*. In this manner, a term became a valuable protection to any person on whose behalf it was kept on foot, as well as a source of serious injury to any incumbrancer, such as the grantee of the rent-charge, who might have neglected to procure an assignment of it on his own behalf, or to obtain a declaration of trust in his favour from the legal owner of the term. For it will be observed that, if the grantee of the rent-charge had obtained from the persons in whom the term was vested a declaration of trust in his behalf, they would have

(*k*) 3 Prest. Conv. 460.

been bound to retain the term, and could not lawfully have assigned it to a trustee for the purchaser.

If the purchaser, at the time of his purchase, should have had notice of the rent-charge, and should yet have procured an assignment of the term to a trustee for his own benefit, the Court of Chancery would, on the first principles of equity, have prevented his trustee from making any use of the term to the detriment of the grantee of the rent-charge (*l*). Such a proceeding would evidently be a direct fraud, and not the protection of an innocent purchaser against an unknown incumbrance. To this rule, however, one exception was admitted, which reflects no great credit on the gallantry, to say the least, of those who presided in the Court of Chancery. In the common case of a sale of lands in fee simple from A. to B., it was holden that, if there existed a term in the lands, created prior to the time when A.'s seisin commenced, or prior to his marriage, an assignment of this term to a trustee for B. might be made use of for the purpose of defeating the claim of A.'s wife, after his decease, to her dower out of the premises (*m*). Here B. evidently had notice that A. was married, and he knew also that, by the law the widow of A. would, on his decease, be entitled to dower out of the lands. Yet the Court of Chancery permitted him to procure an assignment of the term to a trustee for himself, and to tell the widow that, as her right to dower arose subsequently to the creation of the term, she must wait for her dower till the term was ended. We have already seen (*n*), that, as to all women married after the first of January, 1834, the right to dower has been placed at the disposal of their husbands. Such husbands, therefore, had no need to request the concur-

If the pur-

incumbrance
at the time of
his
hu
ur

An exception.

Dower barred
by assignment
of

(*l*) *Willoughby v. Willoughby*,
1 T. Rep. 763.

(*m*) Sugd. Vend. & Pur. 510,
13th ed.; Co. Litt. 208 a, n. (1).

(*n*) Ante, p. 285.

OF PERSONAL INTERESTS IN REAL ESTATE.

rence of their wives in a sale of their lands, or to resort to the device of assigning a term, should this concurrence not have been obtained.

The owner of the inheritance subject to an attendant term had a real estate.

When a term had been assigned to attend the inheritance, the owner of such inheritance was not regarded, in consequence of the trust of the term in his favour, as having any interest of a personal nature, even in contemplation of equity; but as, at law, he had a real estate of inheritance in the lands, subject to the term, so, in equity, he had, by virtue of the trust of the term in his favour, a real estate of inheritance in immediate possession and enjoyment (*o*). If the term were neither surrendered nor assigned to a trustee to attend the inheritance, it still was considered attendant on the inheritance, by construction of law, for the benefit of all persons interested in the inheritance according to their respective titles and estates.

Term attendant by construction of law.

Act to render the assignment of satisfied terms unnecessary.

An Act has, however, been passed "to render the assignment of satisfied terms unnecessary" (*p*). This Act provides (*q*), that every satisfied term of years which, either by express declaration or by construction of law, shall upon the thirty-first day of December, 1845, be attendant upon the reversion or inheritance of any lands, shall *on that day absolutely cease* and determine as to the land upon the inheritance or reversion whereof such term shall be attendant as aforesaid, except that every such term of years which shall be so attendant as aforesaid by express declaration, although thereby made to cease and determine, shall afford to every person the same protection against every incumbrance, charge, estate, right, action, suit, claim, and demand, as it would have afforded to him if it had continued to subsist, but had not been assigned or dealt with, after

(*o*) Sugd. Vend. & Pur. 790,
11th ed.

(*p*) Stat. 8 & 9 Vict. c. 112.
(*q*) Sect. 1.

A TERM OF YEARS.

the said thirty-first day of December, 1845, and shall, for the purpose of such protection, be considered in every Court of law and of equity to be a subsisting term. The Act further provides (r) that every term of years then subsisting, or thereafter to be created, becoming satisfied after the thirty-first of December, 1845, and which, either by express declaration or by construction of law, shall after that day become attendant upon the inheritance or reversion of any land, shall, immediately upon the same becoming so attendant, absolutely cease and determine as to the land upon the inheritance or reversion whereof such term shall become attendant as aforesaid (s). In the two first editions of this work, some remarks on this Act were inserted by way of Appendix. These remarks are now omitted, not because the author changed his opinion on the wording of the Act, but because the remarks, being of a controversial nature, seemed to him to be scarcely fitted to be continued in every edition of a work intended for the use of students, and also because the Act has, upon the whole, conferred a great benefit on the community. Experience has in fact shown that the cases in which purchasers enjoy their property without any molestation are infinitely more numerous than those in which they are compelled to rely on attendant terms for protection; so that the saving of expense to the generality of purchasers seems greatly to counterbalance the inconvenience to which the very small minority may be put, who have occasion to set up attendant terms as a defence against adverse proceedings. And it is very possible that

(r) Stat. 8 & 9 Vict. c. 112, s. 2; *Anderson v. Pignet*, L. C. & LL.J., 21 W. R. 150; L. R., 8 Ch. 180.

(s) It has been decided that a term of years assigned to a trustee

in trust for securing a mortgage debt, and subject thereto to attend the inheritance, is not an attendant term within this act. *Shaw v. Johnson*, 1 Drew. & Smale, 412.

some of the questions to which this Act gives rise may never be actually litigated in a Court of justice.

Enlargement
of long term
into fee
simple.

An important innovation was made in the law relating to long terms of years by the Conveyancing and Law of Property Act, 1881 (*t*). The 65th section of this Act provides for the enlargement into estates in fee simple of long terms of years which fulfil certain conditions: it runs as follows:—

Conditions—

1. Term must have 200 years at least to run.
2. Must have been originally for 300 years at least.
3. Without any trust for or right of redemption by freeholder, &c.
4. Without any rent, &c.

(Sub-sect. 1.) Where a residue unexpired of not less than two hundred years of a term which, as originally created, was for not less than three hundred years, is subsisting in land, whether being the whole land originally comprised in the term, or part only thereof, without any trust or right of redemption affecting the term in favour of the freeholder, or other person entitled in reversion expectant on the term, and without any rent, or with merely a peppercorn rent or other rent having no money value, incident to the reversion, or having had a rent, not being merely a peppercorn rent or other rent having no money value, originally so incident, which subsequently has been released, or has become barred by lapse of time, or has in any other way ceased to be payable, then the term may be enlarged into a fee simple in the manner, and subject to the restrictions, in this section provided.

Who may so
enlarge term.

(Sub-sect. 2.) Each of the following persons (namely):

- (i.) Any person beneficially entitled in right of the term, whether subject to any incumbrance or not, to possession of any land comprised in the term; but, in case of a married woman with the concurrence of her husband, unless she is entitled for her separate

use, whether with restraint on anticipation or not, and then without his concurrence;

(ii.) Any person being in receipt of income as trustee, in right of the term, or having the term vested in him in trust for sale, whether subject to any incumbrance or not;

(iii.) Any person in whom, as personal representative of any deceased person, the term is vested, whether subject to any incumbrance or not;

shall, as far as regards the land to which he is entitled, or in which he is interested, in right of the term, in any such character as aforesaid, have power by deed to declare to the effect that, from and after the execution of the deed, the term shall be enlarged into a fee simple.

Enlargement effected by declaration by deed.

(Sub-sect. 3.) Thereupon, by virtue of the deed and of this Act, the term shall become and be enlarged accordingly, and the person in whom the term was previously vested shall acquire and have in the land a fee simple instead of the term.

(Sub-sect. 4.) The estate in fee simple so acquired by enlargement shall be subject to all the same trusts, powers, executory limitations over, rights, and equities, and to all the same covenants and provisions relating to user and enjoyment, and to all the same obligations of every kind, as the term would have been subject to if it had not been so enlarged.

Fee simple so acquired same trusts, &c. as term.

(Sub-sect. 5.) But where any land so held for the residue of a term has been settled in trust by reference to other land, being freehold land, so as to go along with that other land as far as the law permits, and, at the time of enlargement, the ultimate beneficial interest in the term, whether subject to any subsisting particular estate or not, has not become absolutely and indefeasibly vested in any person, then the estate in fee simple acquired as aforesaid shall, without prejudice to any conveyance for value previously made by a person having

If term settled¹ by reference to freeholds, fee simple so acquired to be settled in same way as such freeholds.

a contingent or defeasible interest in the term, be liable to be, and shall be, conveyed and settled in like manner as the other land, being freehold land, aforesaid, and until so conveyed and settled shall devolve beneficially as if it had been so conveyed and settled.

Fee simple
so acquired
to include
mines, &c.

(Sub-sect. 6.) The estate in fee simple so acquired shall, whether the term was originally created without impeachment of waste or not, include the fee simple in all mines and minerals which at the time of enlargement have not been severed in right or in fact, or have not been severed or reserved by an Inclosure Act or award.

(Sub-sect. 7.) This section applies to every such term as aforesaid subsisting at or after the commencement of this Act.

By the Conveyancing Act, 1882 (*u*), the above section applies to every such term as mentioned therein, whether having as the immediate reversion thereon the freehold or not: but not to any term liable to be determined by re-entry for condition broken, or to any term created by sub-demise out of a superior term, itself incapable of being enlarged into a fee simple.

(*u*) Stat. 45 & 46 Vict. c. 39, s. 11.

CHAPTER II.

OF A MORTGAGE DEBT.

Our next subject for consideration is a mortgage debt. The term mortgage debt is here employed for want of one which can more precisely express the kind of interest intended to be spoken of. Every person who borrows money, whether upon mortgage or not, incurs a *debt* or personal obligation to repay out of whatever means he may possess; and this obligation is usually expressed in a mortgage deed in the shape of a covenant by the borrower to repay the lender the money lent, with interest at the rate agreed on. If, however, the borrower should personally be unable to repay the money lent to him, or if, as occasionally happens, it is expressly stipulated that the borrower shall not be personally liable to repay, then the lender must depend solely upon the property mortgaged; and the nature of his interest in such property, here called his mortgage debt, is now attempted to be explained. In this point of view, a mortgage debt may be defined to be an interest in land of a personal nature, which was recognized as such only by the Court of Chancery, in its office of administering equity. We have seen in the chapter on Uses and Trusts, that the Court of Chancery is now abolished, although the doctrines of equity remain the same. In equity, a mortgage debt is a sum of money, the payment whereof is secured, with interest, on certain lands; and being money, it is personal property, subject to all the incidents which appertain to such property. The Courts of law, on the other hand, did not regard a mortgage in the light of a mere security for the repayment of money

A mortgage debt is a personal interest in land in equity only.

with interest. A mortgage in law was an absolute conveyance, subject to an agreement for a reconveyance on a certain given event. Thus, let us suppose freehold lands to be conveyed by A., a person seised in fee, to B. and his heirs, subject to a proviso, that on repayment on a given future day, by A. to B., of a sum of money then lent by B. to A., with interest until repayment, B. or his heirs will reconvey the lands to A. and his heirs; and with a further proviso (*a*), that until default shall be made in payment of the money, A. and his heirs may hold the land without any interruption from B. or his heirs. Here we have at once a common mortgage of freehold land (*b*). A., who conveys the land, is called

(*a*) Now usually omitted; see Davidson's *Precedents in Conveyancing*, Vol. II., Part II., p. 43, 4th ed.

(*b*) The following duties are imposed by the Stamp Act, 1870, stat. 33 & 34 Vict. c. 97:—

Mortgage, bond, debenture, covenant, warrant of attorney to confess and enter up judgment, and foreign security of any kind:

- (1) Being the only or principal or primary security for—

The payment or repayment of money not exceeding 25 <i>l</i>				£	s.	d.
Exceeding 25 <i>l</i> . and not exceeding 50 <i>l</i> .				0	1	3
„ 50 <i>l</i> .	„ 100 <i>l</i> .	„ 150 <i>l</i> .	„ 200 <i>l</i> .	0	2	6
„ 100 <i>l</i> .	„ 150 <i>l</i> .	„ 200 <i>l</i> .	„ 250 <i>l</i> .	0	3	9
„ 150 <i>l</i> .	„ 200 <i>l</i> .	„ 250 <i>l</i> .	„ 300 <i>l</i> .	0	5	0
„ 200 <i>l</i> .	„ 250 <i>l</i> .	„ 300 <i>l</i> .		0	6	3
„ 250 <i>l</i> .	„ 300 <i>l</i> .			0	7	6
„ 300 <i>l</i> .						

For every 100*l*. and also for any fractional part of 100*l*. of such amount 0 2 6

- (2) Being a collateral or auxiliary or additional or substituted security, or by way of further assurance for the above-mentioned purpose where the principal or primary security is duly stamped:

For every 100*l*. and also for any fractional part of 100*l*. of the amount secured.. .. . 0 0 6

- (3) Transfer, assignment, disposition, or assignation of any mortgage, bond, debenture, covenant or foreign security, or of any money or stock secured by any such instrument, or by any war-

the mortgagor ; B., who lends the money, and to whom the land is conveyed, is called the mortgagee. The conveyance of the land from A. to B. gives to B., as is evident, an estate in fee simple at law. He thenceforth becomes, at law, the absolute owner of the premises, subject to the agreement under which A. has a right of enjoyment, until the day named for the payment of the money (c) ; on which day, if the money be duly paid, B. has agreed to reconvey the estate to A. If, when the day comes, A. should repay the money with interest, B. of course must reconvey the lands ; but if the money should not be repaid punctually on the day fixed, there is evidently nothing on the face of the arrangement to prevent B. from keeping the lands to himself and his heirs for ever. But upon this arrangement, a very different construction was placed by the Courts of law and by the Courts of equity, a construction which well illustrates the difference between the two.

The Courts of law, adhering, according to their ancient custom, to the strict literal meaning of the terms, held, that if A. did not pay or tender the money punctually

Construction
of
in

warrant of attorney to enter up judgment, or by any judgment :

For every 100*l.* and also for any fractional part of 100*l.* of the amount transferred, assigned or disposed 0 0 6

And also where any further money is added to the money already secured (for such further money.

- (4) Reconveyance, release, discharge, surrender, re-surrender, warrant to vacate, or renunciation of any such security as aforesaid, or of the benefit thereof, or of the money thereby secured :

For every 100*l.* and also for any fractional part of 100*l.* of the total amount or value of the money at any time secured 0 0 6

(c) See as to this, *Doe d. Roylance v. Lightfoot*, 8 Mee. & W. 553 ; *Doe d. Parsley v. Day*, 2 Q. B. 147 ; *Rogers v. Grazebrook*, 8 Q. B. 895. See also Davidson's *Precedents in Conveyancing*, Vol. II., Part II., 4th ed., p. 43.

Origin of the term *mortgage*.

on the day named, he should lose the land for ever; and this, according to Littleton (*d*), is the origin of the term *mortgage* or *mortuum vadium*, "for that it is doubtful whether the feoffor will pay at the day limited such sum or not; and if he doth not pay, then the land which is put in pledge, upon condition for the payment of the money, is taken from him for ever, and is dead to him upon condition, &c. And if he doth pay the money, then the pledge is dead as to the tenant, &c." Correct, however, as is Littleton's statement of the law, the accuracy of his derivation may be questioned; as the word *mortgage* appears to have been applied, in more early times, to a feoffment to the creditor and his heirs, to be held by him until his debtor paid him a given sum; until which time he received the rents without account, so that the estate was unprofitable or dead to the debtor in the meantime (*e*); the rents being taken in lieu of interest, which, under the name of usury, was anciently regarded as an unchristian abomination (*f*). This species of mortgage has, however, long been disused, and the form above given is now constantly employed. From the date of the mortgage deed, the legal estate in fee simple belongs, not to the mortgagor, but to the mortgagee. The mortgagor, consequently, with the exceptions next hereafter mentioned, is thenceforward unable to create any legal estate or interest in the premises; previously to the 1st January, 1882, he could not even make a valid lease for a term of years (*g*),—a point of law too frequently neglected by those whose necessities obliged them to mortgage their

The legal estate belongs to the mortgagee.

The mortgagor could not even make a valid lease.

(*d*) Sect. 332.

(*e*) Glanville, lib. 10, cap. 6; Coote on Mortgages, book 1, ch. 2.

(*f*) Interest was first allowed by law by stat. 37 Hen. VIII. c. 9, by which also interest above ten per cent. was forbidden.

(*g*) See *Doe d. Barney v. Adams*,

2 Cro. & Jerv. 235; *Whitton v. Peacock*, 2 Bing. N. C. 411; *Green v. James*, 6 Mee. & Wels. 656; *Doe d. Lord Downe v. Thompson*, 9 Q. B. 1037; *Cuthbertson v. Irving*, 4 H. & N. 724; 6 H. & N. 135; *Saunders v.* 3 H. & Colt. 902.

estates. In some cases, however, by agreement between the parties, a power for the mortgagor to grant leases, operating in the same manner as a power of leasing given to the tenant for life by a settlement (*h*), was inserted in the mortgage deed. An important change has been made in the law on this point by the 18th section of the Conveyancing and Law of Property Act, 1881 (*i*). For if the mortgage be made after the 31st December, 1881, the mortgagor while in possession has power by virtue of that Act to make an agricultural or occupation lease for any term not exceeding twenty-one years, or a building lease for any term not exceeding ninety-nine years, upon the conditions defined in the 18th section of the Act (*k*). Any such lease made in compliance with those conditions will be valid as against the mortgagee or any other incumbrancer. This statutory right of the mortgagor may be excluded by agreement between the parties; for the 18th section applies only if and as far as a contrary intention is not expressed by the mortgagor and mortgagee *in the mortgage deed or otherwise in writing*, and has effect subject to the terms of the mortgage deed or of any such writing, and to the provisions therein contained (*l*). A stipulation that the 18th section of the Act shall not apply, is not uncommon in practice (*m*). It is important for the mortgagee clearly to negative the above right, if he wishes to do so, for a contract to make or accept a lease, under the 18th section, may be enforced by or against every person on whom the lease, if granted, would be binding (*n*). And the provisions of the 18th section are to be construed to extend and apply, as far as circumstances admit, to any letting, and to an agreement, whether in writing or not,

Except under
at
pc

Mortgagor
can
on
certain con-
ditions.

Unless re-
strained by
express stip-
ulation.

(*h*) Ante, p. 354.

(*i*) Stat. 44 & 45 Vict. c. 41.
See Williams's Conveyancing
Statutes, 128—137.

(*k*) Sect. 18. See sub-sects. 1,
3—11.

(*l*) Sect. 18, sub-sect. 13; see
Williams's Conveyancing Sta-
tutes, 134, 135.

(*m*) See Williams's Convey-
ancing Statutes, 133, 499.

(*n*) Sect. 18, sub-sect. 12.

Power of mortgagee in possession to lease.

Express powers of leasing may still be given.

Mortgages made before the year 1882.

When the day of payment had passed, the mortgagee might have ejected the mortgagor without notice.

for leasing or letting (*o*). Exactly similar powers of leasing, which may be excluded or varied by express stipulation in the same way, are given by the same section to a mortgagee of land while in possession; and leases duly made by him under those powers are valid as against all prior mortgagees and incumbrancers, and as against the mortgagor (*p*). But, if desired, express powers of leasing may still be given by the mortgage deed as before; for nothing in the Act is to prevent the mortgage deed from reserving to or conferring on the mortgagor or the mortgagee, or both, any further or other powers of leasing or having reference to leasing; and any powers so given are to be exerciseable, as far as may be, as if they were conferred by the Act, and with all the like incidents, effects and consequences, unless a contrary intention be expressed in the mortgage deed (*q*). Any of the provisions of the 18th section of the Act may, by agreement in writing made after the commencement of the Act (that is, after the 31st December, 1881) between mortgagor and mortgagee, be applied to a mortgage made before the commencement of the Act, so, nevertheless, that any such agreement shall not prejudicially affect any right or interest of any mortgagee not joining in or adopting the agreement (*r*).

Formerly, when the day named for payment had passed, the mortgagee, if not repaid his money, might at any time have brought an action of ejectment against the mortgagor without any notice, and thus have turned him out of possession (*s*); so that, if the debtor had now no greater mercy shown to him than the Courts of law

(*o*) Sect. 18, sub-sect. 17.

(*p*) Sect. 18, sub-sect. 2; see Williams's Conveyancing Statutes, 129.

(*q*) Sect. 18, sub-sect. 14; see Williams's Conveyancing Statutes, 136.

(*r*) Sect. 18, sub-sect. 16.

(*s*) *Keech v. Hall*, Doug. 21; *Doe d. Roby v. Maisy*, 8 Bar. & Cres. 767; *Doe d. Fisher v. Giles*, 5 Bing. 421; Coote on Mortgages, book 3, ch. 3.

allowed, the smallest want of punctuality in his payment would cause him for ever to lose the estate he had pledged. In modern times, a provision was certainly made by Act of Parliament for staying the proceedings in any action of ejectment brought by the mortgagee, on payment by the mortgagor, being the defendant in the action (*t*), of all principal, interest and costs (*u*). But at the time of this enactment, the jurisdiction of equity over mortgages had become fully established; and the Act may consequently be regarded as ancillary only to that full relief, which, as we shall see, the Court of Chancery was accustomed to afford to the mortgagor in all such cases. The Supreme Court of Judicature Act, 1873 (*x*), now provides (*y*) that a mortgagor entitled for the time being to the possession or receipt of the rents and profits of any land, as to which no notice of his intention to take possession, or to enter into the receipt of the rents and profits thereof shall have been given by the mortgagee, may sue for such possession, or for the recovery of such rents or profits, or to prevent or recover damages in respect of any trespass or other wrong relative thereto, in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person (*z*).

Stat. 7 Geo.
II. c. 20.

New enact-
ment.
Mortgagor
may in
his own
name.

The relative rights of mortgagor and mortgagee appear to have long remained on the footing of the strict construction of their bargain, adopted by the Courts of law. It was not till the reign of James I. that the Court of Chancery took upon itself to interfere between the parties (*a*). But at length, having deter-

Interposition
of the Court
of Chancery.

(*t*) *Doe d. Hurst v. Clifton*, 4 Adol. & Ell. 814.

(*u*) Stat. 7 Geo. II. c. 20, s. 1. See also stat. 15 & 16 Vict. c. 76, ss. 219, 220, repealed by stat. 46 & 47 Vict. c. 49; ante, pp. 211

(*x*) Stat. 36 & 37 Vict. c. 66.

(*y*) Sect. 25, sub-sect. (5).

(*z*) See Williams's Conveyancing Statutes, 106, 161.

(*a*) Coote on Mortgages, book 1, ch. 3.

Equity of
redemption.

mined to interpose, it went so far as boldly to lay down as one of its rules, that no agreement of the parties, for the exclusion of its interference, should have any effect (*b*). This rule, no less benevolent than bold, is a striking instance of that determination to enforce fair dealing between man and man, which raised the Court of Chancery, notwithstanding the many defects in its system of administration, to the power and dignity which it enjoyed. The Court of Chancery accordingly held, that after the day fixed for the payment of the money had passed, the mortgagor had still a right to redeem his estate, on payment to the mortgagee of all principal, interest and costs due upon the mortgage to the time of actual payment. This right still remains, and is called the mortgagor's *equity of redemption*; and no agreement with the creditor, expressed in any terms, however stringent, can deprive the debtor of his equitable right, on payment within a reasonable time. The Judicature Act, 1873 (*c*), has expressly assigned to the Chancery Division of the High Court of Justice all causes and matters for, amongst other things, the redemption or foreclosure of mortgages. If, therefore, after the day fixed in the deed for payment, the mortgagee should enter into possession of the property mortgaged, the Chancery Division of the High Court will nevertheless compel him to keep a strict account of the rents and profits; and, when he has received so much as will suffice to repay him the principal money lent, together with interest and costs, he will be compelled to re-convey the estate to his former debtor. In equity the mortgagee is properly considered as having no right to the estate, further than is necessary to secure to himself the due repayment of the money he has advanced, together with interest for the loan; the equity of redemption, which belongs to the mortgagor, renders

(*b*) 2 Cha. Ca. 148; 7 Ves. 273. (*c*) Stat. 36 & 37 Vict. c. 66, s. 34.

the interest of the mortgagee merely of a personal nature, namely, a security for so much money. At law, the mortgagee is absolutely entitled; and, previously to the year 1882, the estate mortgaged might have been devised by his will (*d*), or, if he should have died intestate, would have descended to his heir at law; but in equity he had a security only for the payment of money, the right to which, in common with his other personal estate, devolved on his executors or administrators, for whom his devisee or heir was a trustee; and, when they were paid, such devisee or heir was obliged by the Court, without receiving a sixpence for himself, to re-convey the estate to the mortgagor (*e*). The law on this point is now different: for, as we have seen (*f*), by the Conveyancing and Law of Property Act, 1881 (*g*), on the death, after the 31st of December, 1881, of a sole mortgagee of any real estate of inheritance, his estate, notwithstanding any testamentary disposition, devolves to and becomes vested in his personal representatives or representative but now vests from time to time, in like manner as if the same were a chattel real vesting in them or him. The executor or administrator of the mortgagee has the same security for and right to the payment of the money as he had previously: so that all the rights and obligations, legal as well as equitable, of a sole mortgagee of real estate now pass upon his death to his personal representative.

(*d*) See 1 Jarm. Wills, 689, 4th ed.

(*e*) Under the Vendor and Purchaser Act, 1874 (stat. 37 & 38 Vict. c. 78, s. 4, repealed by stat. 44 & 45 Vict. c. 41, s. 30), the legal personal representative of a mortgagee of a freehold estate, or of a copyhold estate to which the mortgagee should have

been admitted, might, on payment of all sums secured by the mortgage, convey or surrender the mortgaged estate. See Williams's Conveyancing Statutes, 16, 17.

(*f*) Ante, pp. 142, 263.

(*g*) Stat. 44 & 45 Vict. c. 41, s. 30; see Williams's Conveyancing Statutes, 170 et seq.

Foreclosure.

Indulgent, however, as the Court has shown itself to the debtor, it will not allow him for ever to deprive the mortgagee, his creditor, of the money which is his due ; and if the mortgagor will not repay him within a reasonable time, equity will allow the mortgagee for ever to retain the estate to which he is already entitled at law. For this purpose it will be necessary for the mortgagee to bring an action of *foreclosure* against the mortgagor in the Chancery Division of the High Court, claiming that an account may be taken of the principal and interest due to him, and that the mortgagor may be directed to pay the same, with costs, by a day to be appointed by the Court, and that in default thereof he may be foreclosed his equity of redemption. A day is then fixed by the Court for payment ; which day, however, may, on the application of the mortgagor, good reason being shown (*h*), be postponed for a time. Or, if the mortgagor should be ready to make repayment, before the cause is brought to a hearing, he may do so at any time previously, on making proper application to the Court, admitting the title of the mortgagee to the money and interest (*i*). If, however, on the day ultimately fixed by the Court, the money should not be forthcoming, the debtor will then be absolutely deprived of all right to any further assistance from the Court ; in other words, his equity of redemption will be foreclosed, and the mortgagee will be allowed to keep, without further hindrance, the estate which was conveyed to him when the mortgage was first made (*k*). By the Act of the year 1852, to amend the procedure in the Court of Chancery, the Court was empowered, in any suit for foreclosure, to direct a sale of the property at the request of either party instead of a fore-

Sale.

(*h*) *Nanny v. Edwards*, 4 Russ. 124 ; *Eyre v. Hanson*, 2 Beav. 478.

(*i*) Stat. 7 Geo. II. c. 20, s. 2.
(*k*) See *Heath v. Pugh*, 6 Q. B. D. 345 ; 7 App. Cas. 235.

closure (*l*). But this enactment was repealed by the Conveyancing and Law of Property Act, 1881 (*m*). By the 25th section of the same Act (*n*), in any action, whether for foreclosure, or for redemption, or for sale, or for the raising and payment in any manner of mortgage money, the Court, on the request of the mortgagee, or of any person interested either in the mortgage money or in the right of redemption, may, if it thinks fit, direct a sale of the mortgaged property, on such terms as it thinks fit (*o*). An action for redemption is the action brought by a mortgagor, or any person standing in his place, to enforce his equity of redemption. And by the same section of the Act (*p*), any person entitled to redeem mortgaged property may have a judgment or order for sale instead of for redemption in an action brought by him either for redemption alone, or for sale alone, or for sale or redemption in the alternative. But, in an action brought by a person interested in the right of redemption and seeking a sale, the Court may direct the plaintiff to give security for costs (*q*). The equitable jurisdiction of the Court is now extended to the County Courts with respect to all sums not exceeding five hundred pounds (*r*).

action.

Action for redemption.

Action for sale.

County Courts.

In addition to the remedy by foreclosure, which, it will be perceived, involves the necessity of an action in the Chancery Division of the High Court, it has long been usual to provide a more simple and less expensive remedy

(*l*) Stat. 15 & 16 Vict. c. 86, s. 48; *Hurst v. Hurst*, 16 Beav. 374; *Newman v. Selfe*, 33 Beav. 522.

(*m*) Stat. 44 & 45 Vict. c. 41, s. 25, sub-sect. 6.

(*n*) By sub-sect. 5, this section applies to actions brought either before or after the commencement of the Act.

(*o*) Stat. 44 & 45 Vict. c. 41, s. 25, sub-s. 2; see *Williams's Conveyancing Statutes*, 162 et seq.

(*p*) Sect. 25, sub-sect. 1; see *Williams's Conveyancing Statutes*, 162.

(*q*) Sect. 25, sub-sect. 3.

(*r*) Stat. 28 & 29 Vict. c. 99, amended by stat. 30 & 31 Vict. c. 142.

Power of
sale.

The mort-
gagor's con-
currence can-
not be re-
quired.

New enact-
ment.
Statutory
powers of
sale, &c.

Powers of
mortgagee,
where mort-
gage made
by deed after
31st Dec.
1881,

in mortgage transactions; this is nothing more than a power given by the mortgage deed to the mortgagee, without further authority, to sell the premises, in case default should be made in payment. When such a power is exercised, the mortgagee, having the whole estate in fee simple at law, is of course able to convey the same estate to the purchaser; and, as this remedy would be ineffectual, if the concurrence of the mortgagor were necessary, it has been decided that his concurrence cannot be required by the purchaser (s). The mortgagee, therefore, is at any time able to sell; but, having sold, he has no further right to the money produced by the sale than he had to the lands before they were sold. He is at liberty to retain to himself his principal, interest and costs; and, having done this, the surplus, if any, must be paid over to the mortgagor. By the Act commonly called "Lord Cranworth's Act" (t), a power of sale, a power to insure against fire, and a power to require the appointment of a receiver of the rents, or in default to appoint any person as such receiver, were rendered incident to every mortgage or charge made by deed executed after the passing of the Act on any hereditaments of any tenure, unless a contrary intention were declared by the deed. But it was nevertheless usual to insert express powers of sale, &c. in mortgage deeds, until these provisions of Lord Cranworth's Act were repealed and replaced by enactments contained in the Conveyancing and Law of Property Act, 1881 (u). By the 19th section of that Act, in all cases of mortgages made *by deed after the 31st December, 1881*, a mortgagee has the following powers to the like extent

(s) *Corder v. Morgan*, 18 Ves. 344; *Clay v. Sharpe*, Sugd. Vend. & Pur. Appendix, No. XIII. p. 1096, 11th ed.

(t) Stat. 23 & 24 Vict. c. 145 (passed 28th Aug. 1860), part 2; see also sects. 32, 34. See Wil-

liams's Conveyancing Statutes, 137—140.

(u) Stat. 44 & 45 Vict. c. 41, s. 71; see Williams's Conveyancing Statutes, 137—141, 251—253.

as if they had been in terms conferred by the mortgage deed, but not further, viz. :—(i) a power of sale, (ii) a power to insure against fire, (iii) a power to appoint a receiver, and (iv) a power, while in possession, to cut and sell timber (*x*). But these provisions and the operation of this section may be varied or extended or entirely excluded by the terms of the mortgage deed (*y*). And a mortgagee is not to exercise the power of sale or the power of appointing a receiver conferred by this Act unless and until (i) notice requiring payment of the mortgage-money has been served on the mortgagor or one of several mortgagors, and default has been made in payment of the mortgage-money, or of part thereof, for three months after such service; or (ii) some interest under the mortgage is in arrear and unpaid for two months after becoming due; or (iii) there has been a breach of some provision contained in the mortgage deed or in the Act, and on the part of the mortgagor, or of some person concurring in making the mortgage, to be observed or performed, other than and besides a covenant for payment of the mortgage-money or interest thereon (*z*). Power is expressly given by the Act to a mortgagee exercising the above statutory power of sale by deed to convey the property sold for such estate and interest therein as is the subject of the mortgage, freed from all estates, interests and rights to which the mortgage has priority (*a*). The proper application of the purchase-money by the mortgagee is also provided for (*b*). Where a conveyance is made in *professed* exercise of the power of sale conferred by this Act, the title of the

in the absence
of stipulation
to the con-
trary.

(*x*) Sect. 19, sub-sects. 1, 4; see Williams's Conveyancing Statutes, 137—141.

(*y*) Sect. 19, sub-sects. 3, 4; see Williams's Conveyancing Statutes, 141—144.

(*z*) Stat. 44 & 45 Vict. c. 41, ss. 20, 24; see Williams's Con-

veyancing Statutes, 144, 145, 160.

(*a*) Sect. 21, sub-sect. 1; see Williams's Conveyancing Statutes, 145—147.

(*b*) Sect. 21, sub-sect. 3; see Williams's Conveyancing Statutes, 149.

purchaser is not to be impeachable on the ground that no case had arisen to authorize the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised; but any person damnified by an unauthorized, or improper, or irregular exercise of the power, is to have his remedy in damages against the person exercising the power (*c*). It is now usual in practice to rely upon the powers conferred by this Act, instead of inserting express powers for the same purposes in mortgage deeds (*d*).

Mortgagor
must give six
calendar
months' previous
notice in writing
of his intention
so to do, and must
then punctually
pay or tender the
money at the
expiration of the
notice (*e*); for
if the money
should not be
then ready to be
paid, the mortgagee
will be entitled
to fresh notice;
as it is only
reasonable that
he should have
time afforded him
to look out for a
fresh security for
his money.

If, after the day fixed for the payment of the money is passed, the mortgagor should wish to pay off the mortgage, he must give to the mortgagee six calendar months' previous notice in writing of his intention so to do, and must then punctually pay or tender the money at the expiration of the notice (*e*); for if the money should not be then ready to be paid, the mortgagee will be entitled to fresh notice; as it is only reasonable that he should have time afforded him to look out for a fresh security for his money.

Mortgages for
long terms of

Mortgages of freehold lands are sometimes made for long terms, such as 1,000 years. But this is not now often the case, as the fee simple is more valuable, and therefore preferred as a security. Mortgages for long terms, when they occur, are usually made by trustees, in whom the terms have been vested in trust to raise, by mortgage, money for the portions of the younger children of a family, or other similar purposes. The reasons for vesting such terms in trustees for these purposes were explained in the last chapter (*f*).

(*c*) Sect. 21, sub-sect. 2; see Williams's Conveyancing Statutes, 147—149.

(*d*) As to the question of the expediency of relying on statutory powers, see Williams's Convey-

ancing Statutes, 141—144, 252, 253.

(*e*) *Shrapnell v. Blake*, 2 Eq. Ca. Abr. 603, pl. 34.

(*f*) See ante, p. 486.

Copyhold, as well as freehold, lands may be the subjects of mortgage. The purchase of copyholds, it will be remembered, is effected by a surrender of the lands from the vendor into the hands of the lord of the manor, to the use of the purchaser, followed by the admittance of the latter as tenant to the lord (*g*). The mortgage of copyholds is effected by surrender, in a similar manner, from the mortgagor to the use of the mortgagee and his heirs, subject to a condition, that on payment by the mortgagor to the mortgagee of the money lent, together with interest, on a given day, the surrender shall be void. If the money should be duly paid on the day fixed, the surrender will be void accordingly, and the mortgagor will continue entitled to his old estate; but if the money should not be duly paid on that day, the mortgagee will then acquire at law an absolute right to be admitted to the customary estate which was surrendered to him; subject nevertheless to the equitable right of the mortgagor, confining the actual benefit derived by the former to his principal money, interest and costs. The mortgagee, however, is seldom admitted, unless he should wish to enforce his security, contenting himself with the right to admittance, conferred upon him by the surrender; and, if the money should be paid off, all that will then be necessary will be to procure the steward to insert on the Court rolls a memorandum of acknowledgment, by the mortgagee, of satisfaction of the principal money and interest secured by the surrender (*h*). If the mortgagee should have been admitted tenant, he must, of course, on repayment, surrender to the use of the mortgagor, who will then be re-admitted.

Mortgage of
copyholds.

Leasehold estates also frequently form the subjects of mortgage. The term of years of which the estate

Mortgage of
leaseholds.

(*g*) Ante, pp. 439, 440.

(*h*) 1 Scriv. Cop. 242; 1 Watk. Cop. 117, 118.

consists is assigned by the mortgagor to the mortgagee, subject to a proviso for redemption or re-assignment on payment, on a given day, by the mortgagor to the mortgagee, of the sum of money advanced with interest; and with a further proviso for the quiet enjoyment of the premises by the mortgagor until default shall be made in payment. The principles of equity as to redemption apply equally to such a mortgage, as to a mortgage of freeholds; but, as the security, being a term, is always wearing out, payment will not be permitted to be so long deferred. A power of sale also is frequently inserted in a mortgage of leaseholds, and the statutory powers given by the Conveyancing and Law of Property Act, 1881 (i), may be incorporated in a mortgage of leaseholds. From what has been said in the last chapter (k), it will appear that, as the mortgagee is an assignee of the term, he will be liable to the landlord, during the continuance of the mortgage, for the payment of the rent and the performance of the covenants of the lease; against this liability the covenant of the mortgagor is his only security. In order, therefore, to obviate this liability, when the rent or covenants are onerous, mortgages of leaseholds are frequently made by way of demise or underlease: the mortgagee by this means becomes the tenant only of the mortgagor, and consequently a mere stranger with regard to the landlord (l). The security of the mortgagee in this case is obviously not the whole term of the mortgagor, but only the new and derivative term created by the mortgage.

Mortgage by underlease.

Deposit of title deeds.

In some cases the exigency of the circumstances will not admit of time to prepare a regular mortgage; a deposit of the title deeds is then made with the mort-

(i) Stat. 44 & 45 Vict. c. 41, s. 19, ante, pp. 510—512; see sect. 2 (i. vi.); Williams's Con-

veyancing Statutes, 27, 28, 137.

(k) Ante, p. 462.

(l) See ante, p. 478.

gagee: and, notwithstanding the stringent provision of the Statute of Frauds to the contrary (*m*), it was held by the Court of Chancery that such a deposit, even without any writing, operated as an equitable mortgage of the estate of the mortgagor in the lands comprised in the deeds (*n*). This doctrine still remains; and the same doctrine applies to copies of Court roll relating to copyhold lands (*o*), for such copies are the title deeds of copyholders.

When lands are sold, but the whole of the purchase-money is not paid to the vendor, he has a lien in equity on the lands for the amount unpaid, together with interest at four per cent., the usual rate allowed in equity (*p*). And the circumstance of the vendor having taken from the purchaser a bond or a note for the payment of the money will not destroy the lien (*q*). But if the vendor take a mortgage of part of the estate, or any other independent security, his lien will be gone. If the sale be made in consideration of an annuity, it appears that a lien will subsist for such annuity (*r*), unless a contrary intention can be inferred from the nature of the transaction (*s*).

Vendor's lien.

Sale for annuity.

A curious illustration of the anxiety of the Court of Chancery to prevent any imposition being practised

A stipulation to raise the interest on

(*m*) 29 Car. II. c. 3, ss. 1, 3; ante, p. 183. 272; *Mackreth v. Symmons*, 15 Ves. 328; Sugd. Vend. & Pur. 670, 14th ed.

(*n*) *Russell v. Russell*, 1 Bro. C. C. 269. See *Ex parte Haigh*, 11 Ves. 403. (*q*) *Grant v. Mills*, 2 Ves. & Bea. 306; *Winter v. Lord Anson*, 3 Russ. 488.

(*o*) *Whitbread v. Jordan*, 1 You. & Coll. 303; *Lewis v. John*, 1 C. P. Coop. 8. See, however, Sugd. Vend. & Pur. 630, 13th ed.; *Jones v. Smith*, 1 Hare, 56; 1 Phill. 244. (*r*) *Matthew v. Bowler*, 6 Hare, 110.

(*p*) *Chapman v. Tanner*, 1 Vern. 267; *Polluxfen v. Moore*, 3 Atk. 272; *Buckland v. Pocknell*, 13 Sim. 496; *Dixon v. Gayfere*, 21 Beav. 118; 1 De Gex & Jones, 655.

(*s*) *Buckland v. Pocknell*, 13 Sim. 496; *Dixon v. Gayfere*, 21 Beav. 118; 1 De Gex & Jones, 655.

failure of
punctual pay-
ment is void.

But a stipula-
tion to
diminish the
interest on
punctual pay-
ment is good.

5l. per cent.
formerly the
highest rate
of interest on
mortgages of
lands.

Repeal of the
usury laws.

by the mortgagee upon the mortgagor occurs in the following doctrine: that, if money be lent at a given rate of interest, with a stipulation that, on failure of punctual payment, such rate shall be increased, this stipulation is held to be void as too great a hardship on the mortgagor; whereas, the very same effect may be effectually accomplished by other words. If the stipulation be, that the higher rate shall be paid, but on punctual payment a lower rate of interest shall be accepted, such a stipulation, being for the benefit of the mortgagor, is valid, and will be allowed to be enforced (*t*). The highest rate of interest which could formerly be taken upon the mortgage of any lands, tenements or hereditaments, or any estate or interest therein, was formerly 5l. per cent. per annum; and all contracts and assurances, whereby a greater rate of interest was reserved or taken on any such security, were deemed to have been made or executed for an illegal consideration (*u*). By a modern statute (*x*), the previous restriction of the interest of all loans to 5l. per cent. was removed, with respect to contracts for the loan or forbearance of money above the sum of 10l. sterling; but loans upon the security of any lands, tenements or hereditaments, or any estate or interest therein, were expressly excepted (*y*). But, by an Act of Parliament passed on the 10th of August, 1854 (*z*), all the laws against usury were repealed; so that, now, any rate of interest may be taken on a mortgage of lands which the mortgagor is willing to pay.

(*t*) 3 Burr. 1374; 1 Fonb. Eq. 398. See *Union Bank of London, v. Ingram*, 16 Ch. D. 53.

(*u*) Stat. 12 Anne, st. 2, c. 16; 5 & 6 Will. IV. c. 41; 2 & 3 Vict. c. 37; *Thibault v. Gibson*, 12 Mee. & Wels. 88; *Hodgkinson*

v. Wyatt, 4 Q. B. 749.

(*x*) 2 & 3 Vict. c. 37, continued by stat. 13 & 14 Vict. c. 56.

(*y*) See *Follett v. Moore*, 4 Ex. Rep. 410.

(*z*) Stat. 17 & 18 Vict. c. 90.

The loan of money on mortgage is an investment frequently resorted to by trustees, when authorized by their trust to make such use of the money committed to their care: in such a case, the fact that they are trustees, and the nature of their trust, are usually omitted in the mortgage deed, in order that the title of the mortgagor or his representatives may not be affected by the trusts. It is, however, a rule of equity, that when money is advanced by more persons than one, it shall be deemed, unless the contrary be expressed, to have been lent in equal shares by each (*a*); if this were the case, the executor or administrator of any one of the parties would, on his decease, be entitled to receive his share (*b*). In order, therefore, to prevent the application of this rule, it was usual to declare, in all mortgages made to trustees, that the money was advanced by them on a joint account, and that, in case of the decease of any of them in the lifetime of the others, the receipts of the survivors or survivor should be an effectual discharge for the whole of the money. The 61st section of the Conveyancing and Law of Property Act, 1881 (*c*), now enacts, with regard only to mortgages, obligations or transfers made after the 31st December, 1881 (*d*), that where in a mortgage, or an obligation for payment of money, or a transfer of a mortgage or of such an obligation, the sum, or any part of the sum, advanced or owing is expressed to be advanced by or owing to more persons than one out of money, or as money, belonging to them on a joint account, or a mortgage, or such an obligation, or such a transfer is made to more persons than one, jointly, and

Mortgages to trustees.

clause.

made to two or more jointly after 31st Dec.

(*a*) 3 Atk. 734; 2 Ves. sen. 258; 3 Ves. jun. 631.

(*b*) *Petty v. Styward*, 1 Cha. Rep. 57; 1 Eq. Ca. Ab. 290; *Vickers v. Cowell*, 1 Beav. 529.

(*c*) Stat. 44 & 45 Vict. c. 41;

as to the effect of sect. 61, see Williams's Conveyancing Statutes, 238—240, 498.

(*d*) Stat. 44 & 45 Vict. c. 41, s. 61, sub-sect. 3; sect. 1, sub-sect. 2.

OF PERSONAL INTERESTS IN REAL

not in shares, the mortgage-money, or other money, or money's worth, for the time being due to those persons on the mortgage or obligation, shall be deemed to be and remain money or money's worth belonging to those persons on a joint account, as between them and the mortgagor or obligor; and the receipt in writing of the survivors or last survivor of them, or of the personal representatives of the last survivor, shall be a complete discharge for all money or money's worth for the time being due, notwithstanding any notice to the payer of a severance of the joint account. But the operation of this section may be varied or excluded by the terms of the mortgage, obligation, or transfer (*e*).

Judgment debts a charge on mortgagor's interest in the lands.

We have already defined a mortgage debt as an interest in land of a personal nature (*f*); and in accordance with this view, it was held that judgment debts against the mortgagee were a charge upon his interest in the mortgaged lands (*g*). But it was afterwards provided (*h*), that where any mortgage should have been paid off prior to, or at the time of, the conveyance of the lands to a purchaser or mortgagee for valuable consideration, the lands should be discharged both of the judgment and Crown debts of the mortgagee. And by a still more recent statute, to which we have already referred (*i*), the lien of all judgments, of a date later than the 29th of July, 1864, was abolished.

New enactment.

Transfer of mortgages.

Mortgages are frequently transferred from one person to another. The mortgagee may wish to be paid off, and another person may be willing to advance the

(*e*) Sect. 61, sub-sect. 2.

(*f*) Ante, p. 499.

(*g*) *Russell v. McCulloch*, V.-C. Wood, 1 Jur., N. S. 157; S. C. 1 Kay & J. 313.

(*h*) Stat. 18 & 19 Vict. c. 15, s. 11; *Greaves v. Wilson*, Rolls, 4 Jur., N. S. 802; S. C. 25 Beav. 434.

(*i*) Stat. 27 & 28 Vict. c. 112, ante, p. 112.

OF A MORTGAGE DEBT.

same or a further amount on the same security. In such a case the mortgage debt and interest are assigned by the old to the new mortgagee; and the lands which form the security are conveyed, or if leasehold assigned, by the old to the new mortgagee, subject to the equity of redemption which may be subsisting in the premises; that is, subject to the right in equity of the mortgagor or his representatives to redeem the premises on payment of the principal sum secured by the mortgage, with all interest and costs (*k*).

Under the Conveyancing and Law of Property Act, 1881 (*l*), a mortgagor entitled to redeem now has power ^{may be} to require a mortgagee, who is not and has not been in possession, instead of reconveying, and on the terms on which he would be bound to reconvey, to assign the mortgaged debt and convey the mortgaged property to any third person; and the mortgagee will then be bound to assign and convey accordingly. The effect of these provisions of the Act is discussed in the editor's Conveyancing Statutes (*m*).

During the continuance of a mortgage, the equity ^{Equity of re-} of redemption which belongs to the mortgagor is re- ^{estate.} garded by the Court as an estate, which is alienable by the mortgagor, and descendible to his heir, in the same manner as any other estate in equity (*n*); the Court in truth regards the mortgagor as the owner of the same estate as before, subject only to the mortgage. In the event of the decease of the mortgagor, the land mortgaged will consequently devolve on the devisee under his will, or, if he should have died intestate, on his heir. And the mortgage debt, to which the lands are subject,

(*k*) As to the stamp on a transfer, see stat. 33 & 34 Vict. c. 97, Schedule, tit. Mortgage, ante, p. 500; *Wale v. Commissioners of Inland Revenue*, 4 Ex. D. 270.

(*l*) Stat. 44 & 45 Vict. c. 41, s. 15, amended by stat. 45 & 46 Vict. c. 39, s. 12.

(*m*) Pp. 119—124.

(*n*) See ante, p. 193 (see note

The mortgage
debt primarily
payable out of
the mort-
gaged lands.

was formerly payable in the first place, like all other debts, out of the personal estate of the mortgagor (*o*). As in equity the lands are only a security to the mortgagee, in case the mortgagor should not pay him, so also in equity the lands still devolved as the real estate of the mortgagor, subject only to be resorted to for payment of the debt, in the event of his personal estate being insufficient for the purpose. But by an Act of the present reign (*p*) it was provided, that when any person should after the 31st of December, 1854, die seised of or entitled to any estate or interest in any land or other hereditaments which should at the time of his death be charged with the payment of any sum of money by way of mortgage, and such person should not, by his will or deed or other document, *have signified any contrary or other intention*, the heir or devisee, to whom such lands or hereditaments should descend or be devised, should not be entitled to have the mortgage debt discharged or satisfied out of the personal estate or any other real estate of such person; but the land or hereditaments so charged should, as between the different persons claiming through or under the deceased person, be primarily liable to the payment of all mortgage debts with which the same should be charged; every part thereof according to its value, bearing a proportionate part of the mortgage debts charged on the whole thereof; provided that nothing therein contained should affect or diminish any right of the mortgagee to obtain payment of his mortgage debt either out of the ^{full} real estate of the person so dying as aforesaid provided also, that nothing therein affect the rights of any person by will or document made before the

(*o*) See *Yates v. Aston*, 4 Q. B. 182; *Mathew v. Blackmore*, 1 H. & N. 762; *Essay on Real Assets*, p. 27.

OF A MORTGAGE DEBT.

This Act, having given rise to many doubts, was explained by another Act (*q*), which provided (*r*), that in the construction of the will of any person who might die after the 31st of December, 1867, a general direction that the debts, or that all the debts of the testator, should be paid out of his personal estate, should not be deemed to be a declaration of an intention contrary to or other than the rule established by the Act, unless such contrary or other intention should be further declared by words expressly or by necessary implication referring to all or some of the testator's debts or debt charged by way of mortgage on any part of his real estate. It was further provided (*s*), that the word "mortgage" should be deemed to extend to any lien for unpaid purchase-money upon any lands or hereditaments purchased by a *testator*. Act to explain

On the construction of these Acts, it was held that they were inapplicable to leaseholds for years (*t*). It was also held that the latter Act did not extend the term "mortgage" to a lien for unpaid purchase-money upon lands purchased by a person who died *intestate* (*u*). An Act has accordingly been passed to amend both of the Acts above mentioned (*x*). This Act provides that these Acts shall, as to any testator or intestate dying after the 31st of December, 1877, be held to extend to a testator or intestate dying seised or possessed of or entitled to any land or other hereditaments of whatever tenement which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage or any other equitable charge, including any Act to

- | | |
|---|---|
| <p>(<i>q</i>) Stat. 30 & 31 Vict. c. 69.
 (<i>r</i>) Sect. 1.
 (<i>s</i>) Stat. 30 & 31 Vict. c. 69,
 s. 2.
 (<i>t</i>) <i>Solomon v. Solomon</i>, M. R.,
 12 W. R. 540; 10 Jur., N. S.</p> | <p>331; <i>Gael v. Fenwick</i>, M. R., 22
 W. R. 211.
 (<i>u</i>) <i>Harding v. Harding</i>, V.-C.
 B., L. R., 13 Eq. 493.
 (<i>x</i>) Stat. 40 & 41 Vict. c. 34.
 <i>Re Cockcroft</i>, 24 Ch. D. 94.</p> |
|---|---|

lien for unpaid purchase-money; and the devisee or legatee or heir shall not be entitled to have such sum or sums discharged or satisfied out of any other estate of the testator or intestate, unless (in the case of a testator) he shall, within the meaning of the said Acts, have signified a contrary intention; and such contrary intention shall not be deemed to be signified by a charge of or direction for payment of debts upon or out of residuary real and personal estate, or residuary real estate.

Mortgage of
equity of re-
demption.

The equity of redemption belonging to the mortgagor may again be mortgaged by him, either to the former mortgagee by way of further charge, or to any other person. In order to prevent frauds by clandestine mortgages, it is provided by an Act of William and Mary (y), that a person twice mortgaging the same lands, without discovering the former mortgage to the second mortgagee, shall lose his equity of redemption. Unfortunately, however, in such cases the equity of redemption, after payment of both mortgages, is generally worth nothing. And if the mortgagor should again mortgage the lands to a third person, the Act will not deprive such third mortgagee of his right to redeem the two former mortgages (z). When lands are mortgaged, as occasionally happens, to several persons, each ignorant of the security granted to the other, the general rule is, that the several mortgages rank as charges on the lands in the order of time in which they were made, according to the maxim *Qui prior est tempore, potior est jure* (a). But as the first mortgagee alone obtains the legal estate, he has this advantage over the others, that if he takes a further charge on a subsequent advance

(y) Stat. 4 & 5 Will. & Mary, c. 16, s. 3; see *Kennard v. Futvoys*, 2 Gif. 81.

(z) Stat. 4 & 5 Will. & Mary,

c. 16, s. 4.

(a) *Jones v. Jones*, 8 Sim. 633; *Wiltshire v. Rabbits*, 14 Sim. 76; *Wilmot v. Pike*, 5 Hare, 14.

to the mortgagor, without notice of any intermediate second mortgage, he will be preferred to an intervening second mortgagee (*b*). And if a third mortgagee, who has made his advance without notice of a second mortgage, can procure a transfer to himself of the first mortgage, he may *tack*, as it is said, his third mortgage to the first, and so postpone the intermediate incumbrancer (*c*). For, in a contest between innocent parties, each having equal right to the assistance of the Court, the one who happens to have the legal estate is preferred to the others; the maxim being, That when the equities are equal, the law shall prevail. An attempt was made to abolish tacking by the 7th section of the Vendor and Purchaser Act, 1874 (*d*); but this enactment was repealed by the Land Transfer Act, 1875 (*e*), as from the date at which it came into operation, except as to any thing duly done thereunder before the commencement of that Act.

Mortgages or charges made by any deed or writing on land in Middlesex, Yorkshire or Kingston-upon-Hull, ought to be registered in the proper county register as well as purchase deeds (*f*). Under the Middlesex Registry Act, if more mortgages than one be made of the same piece of land, they have priority according to the date of registration (*g*); with this exception, that the claim of a mortgagee, who has obtained the legal estate without notice of any previous equitable charge and has duly registered his mortgage, will be preferred to the claims of those who may previously

(*b*) *Goddard v. Complin*, 1 Cha. Ca. 119.

(*c*) *Brace v. Duchess of Marlborough*, 2 P. Wms. 491; *Bates v. Johnson*, Johnson, 304.

(*d*) Stat. 37 & 38 Vict. c. 78, passed 7th August, 1874.

(*e*) Stat. 38 & 39 Vict. c. 87, s. 129. This Act commenced 1st January, 1876.

(*f*) See ante, pp. 231—233.

(*g*) See *Neve v. Pennell*, 2 H. & M. 170.

Enactment

Mortgages of land in Mid-

Future advances.

mortgagor to the mortgagee (z). Where a mortgage extends to future advances, it has been decided, that the mortgagee cannot safely make such advances, if he have notice of an intervening second mortgage (a).

Future costs.

It was formerly a rule of equity that a solicitor could not take from his client a mortgage to secure future costs, lest he should be tempted on the strength of it to run up a long bill (b). This illiberal rule was abolished by the Attorneys and Solicitors Act, 1870 (c), which provides (d), that an attorney or solicitor may take security from his client for his future fees, charges and disbursements, to be ascertained by taxation or otherwise. This Act does not now apply to business to which the Solicitors' Remuneration Act, 1881 (e), relates. But the latter Act (f), and the general order made there-

New enactment.

(z) The Stamp Act, 1870, stat. 33 & 34 Vict. c. 97, provides, sect. 107 (1), that a security for the payment or repayment of money to be lent, advanced or paid, or which may become due on an account current, either with or without money previously due, is to be charged, where the total amount secured or to be ultimately recoverable is in any way limited, with the same duty as a security for the amount so limited. (2) That where such total amount is unlimited, the security is to be available for such an amount only as the *ad valorem* duty impressed thereon extends to cover. (3) Provided that no money to be advanced for the insurance of any property comprised in any such security against damage by fire, or for keeping up any policy of life insurance comprised in such se-

curity, or for effecting in lieu thereof any new policy, or for the renewal of any grant or lease of any property comprised in such security upon the dropping of any life whereon such property is held, shall be reckoned as forming part of the amount in respect whereof the security is chargeable with *ad valorem* duty.

(a) *Rolt v. Hopkinson*, L. C., 4 Jur., N. S. 1119; S. C., 3 De Gex & Jones, 177, affirmed in the H. of L., 9 W. R. 900; S. C., 9 H. of L. Cas. 514; overruling *Gordon v. Graham*, 7 Vin. Ab. 52, pl. 3. See also *Menzies v. Lightfoot*, M. R., Law Rep., 11 Eq. 459.

(b) *Jones v. Tripp*, Jacob, 322.

(c) Stat. 33 & 34 Vict. c. 28.

(d) Sect. 16.

(e) Stat. 44 & 45 Vict. c. 44, s. 9. See ante, p. 238.

(f) Sect. 5.

under (g), authorize the taking by a solicitor from his client of security for future remuneration for such business.

There is one case in which the rules of equity singularly, and, as the author thought, unduly favoured the mortgagee. If one person should have mortgaged lands to another for a sum of money, and subsequently have mortgaged other lands to the same person for another sum of money, the mortgagee was placed by the rules of equity in the same favourable position as if the whole of the lands had been mortgaged to him for the sum total of the money advanced. The mortgagor could not redeem either mortgage, after it had become absolute at law (h), without also redeeming the other: and the mortgagee might enforce the payment of the whole of the principal and interest due to him on both mortgages out of the lands comprised in either (i). This rule, known as the doctrine of consolidation of securities, was extended to the case of mortgages of different lands made to different persons by the same mortgagor becoming vested by transfer in the same mortgagee. In such a case, it was held that the mortgagee, who had taken a transfer of the different mortgages, might consolidate all his securities as against the original mortgagor (k). But it was decided that a mortgagee could not consolidate his securities as against an assignee of the equity of redemption, unless he should have acquired a right of consolidation previously to the assignment of the equity of redemption (l). The

Effect of two
Consolidation
of securities.

See ante, p. 238.

Cummins v. Fletcher, 14 Ch. D. 699. The right of a mortgagee to consolidate does not arise until the interest of the mortgagor has become an equity of redemption; 14 Ch. D. 708, 709, 712, 713, 715; see ante, pp. 500—502, 506.

(i) *Pope v. Onslow*, 2 Vern. 286; *Jones v. Smith*, 2 Ves. jun. 372, 376.

(k) *Salby v. Pomfret*, 1 J. & H. 336; 3 De G., F. & J. 695; *Harter v. Colman*, 19 Ch. D. 630, 639.

(l) *White v. Hillacre*, 3 Y. & C. Ex. 597, 608, 609; *Jennings v.*

OF PERSONAL INTERESTS IN REAL ESTATE.

of consolidation arose at the time when two or more mortgages made by the same mortgagor, or any of his predecessors in title, became vested in the same mortgagee and absolute at law (*m*).

The right of a mortgagee to consolidate his securities is now abolished in certain cases by the following section of the Conveyancing and Law of Property Act, 1881 (*n*) :—

(Sect. 17, sub-sect. 1.) A mortgagor seeking to redeem any one mortgage, shall, by virtue of this Act, be entitled to do so without paying any money due under any separate mortgage made by him, or by any person through whom he claims, on property other than that comprised in the mortgage which he seeks to redeem.

(Sub-sect. 2.) This section applies only if and as far as a contrary intention is not expressed in the mortgage deeds, or one of them.

(Sub-sect. 3.) This section applies only where the mortgages, or one of them, are or is made after the commencement of this Act (*o*).

The rules of equity as to consolidation of securities thus appear still to remain in force in all cases in which the mortgages sought to be consolidated by a mortgagee were made before the 1st January, 1882, or in which one of the mortgages, though made after the 31st December, 1881, was created by a deed expressing an intention to exclude the application of the above enactment. A declaration of such an intention is not unfrequently inserted in mortgage deeds. It follows,

Jordan, 6 App. Cas. 698; *Harter v. Colman*, 19 Ch. D. 630; see *Fint v. Padget*, 2 De G. & J. 611.

(*m*) *Cummins v. Fletcher*, 14 Ch. D. 699.

(*n*) Stat. 44 & 45 Vict. c. 41. See Williams's Conveyancing Statutes, 125—128.

(*o*) After the 31st December, 1881. Sect. 1, sub-sect. 2.

therefore, that no person can safely lend money on a second mortgage. For, in addition to the risks of some third mortgagee getting in and *tacking* the first mortgage (*p*), there is this further danger, that the first mortgagee may have previously acquired a right to consolidate with his security some other mortgage, by which property of the same mortgagor has been charged for more than its value, and may, by exercising this right, exclude the second mortgagee (*q*). The purchaser of an equity of redemption is exposed to similar risks. Hence, it follows, that, in the words of an eminent judge, "It is a very dangerous thing at any time to buy equities of redemption, or to deal with them at

Ante, p. 523.

(*r*) *Bevor v. Luck*, V.-C. W.,

(*q*) See Williams's Convey- L. R., 4 Eq. 537, 549.
ancing Statutes, 126—128.

PART V.

OF TITLE.

It is evident that the acquisition of property is of little benefit, unless accompanied with a prospect of retaining it without interruption. In ancient times conveyances were principally made from a superior to an inferior, as from the great baron to his retainer, or from a father to his daughter on her marriage (*a*). The grantee became the tenant of the grantor; and if any consideration were given for the grant, it more frequently assumed the form of an annual rent, than the immediate payment of a large sum of money (*b*). Under these circumstances, it may readily be supposed, that, if the grantor were ready to warrant the grantee quiet possession, the title of the former to make the grant would not be very strictly investigated; and this appears to have been the practice in ancient times; every charter or deed of feoffment usually ending with a clause of warranty, by which the feoffor agreed that he and his heirs would warrant, acquit, and for ever defend the feoffee and his heirs against all persons (*c*). Even if this warranty were not expressly inserted, still it would seem that the word *give*, used in a feoffment, had the effect of an implied warranty; but the force of such implied warranty was confined to the feoffor only, exclusive of his heirs, whenever a feoffment was made of lands to be holden of the chief lord of the fee (*d*). Under an express warranty,

Warranty.

Warranty
implied by
wordExpress
warranty.(*a*) See ante, p. 60.(*b*) Ante, p. 61.(*c*) Bract. lib. 2, cap. 6, fol. 17a.(*d*) 4 Edw. I. stat. 3, c. 6; 2
Inst. 275; Co. Litt. 384 a, n. (1).

the feoffor, and also his heirs, were bound, not only to give up all claim to the lands themselves, but also to give to the feoffee or his heirs other lands of the same value, in case of the eviction of the feoffee or his heirs by any person having a prior title (*c*) ; and this warranty was binding on the heir of the feoffor, whether he derived any lands by descent from the feoffor or not (*f*), except only in the case of the warranty commencing, as it was said, by disseisin ; that is, in the case of the feoffor making a feoffment with warranty of lands of which he, by that very act (*g*), disseised some person (*h*), in which case it was too palpable a hardship to make the heir answerable for the misdeed of his ancestor. But, even with this exception, the right to bind the heir by warranty was found to confer on the ancestor too great a power ; thus, a husband, whilst tenant by the curtesy of his deceased wife's lands, could, by making a feoffment of such lands with warranty, deprive his son of the inheritance ; for the eldest son of the marriage would usually be heir both to his mother and to his father ; as heir to his mother he would be entitled to her lands, but as heir of his father he was bound by his warranty. This particular case was the first in which a restraint was applied by Parliament to the effect of a warranty, it having been enacted (*i*), that the son should not, in such a case, be barred by the warranty of his father, unless any heritage descended to him of his father's side, and then he was to be barred only to the extent of the value of the heritage so descended. The force of a warranty was afterwards greatly restrained by other statutes, enacted to meet other cases (*k*) ; and the clause

(*c*) Co. Litt. 365 a.

(*f*) Litt. s. 712.

(*g*) Litt. s. 704 ; Co. Litt. 371 a.

(*h*) Litt. ss. 697, 698, 699, 700.

(*i*) Stat. 6 Edw. I. c. 3.

(*k*) Stat. *De donis*, 13 Edw. I. c. 1, as construed by the judges ; see Co. Litt. 373 b, n. (2) , Vaughan, 375 ; stats. 11 Hen. VII. c. 20 ; 4 & 5 Anne, c. 3 (c. 16 in Ruffhead), s. 21.

Warranty
now
tual.

of warranty having long been disused in modern conveyancing, its chief force and effect have now been removed by clauses of two modern statutes, passed at the recommendation of the Real Property Commissioners (*l*).

Words which
in themselves
imply a cove-
nant for quiet
enjoyment.
Demise.

In addition to an express warranty, there were formerly some words used in conveyancing, which in themselves implied a covenant for quiet enjoyment; and one of these words, namely, the word *demise*, still retains this power. Thus, if one man demises and lets land to another for so many years, this word *demise* operates as an absolute covenant for the quiet enjoyment of the land by the lessee during the term (*m*). But if the lease should contain an express covenant by the lessor for quiet enjoyment, limited to his own acts only, such express covenant, showing clearly what is intended, will nullify the implied covenant, which the word *demise* would otherwise contain (*n*). So, as we have seen, the word *give* formerly implied a personal warranty; and the word *grant* was supposed to have implied a warranty, unless followed by an express covenant, imposing on the grantor a less liability (*o*). An

Grant.

Exchange.

Partition.

*Grant, bargain
and sell, in
bargain and
sale of lands
in Yorkshire.*

exchange and a partition between coparceners have also until recently implied a mutual right of re-entry, on the eviction of either of the parties from the lands exchanged or partitioned (*p*). And, by the former Registry for Yorkshire, the words *grant, bargain and sell*, in a deed of *bargain and sale* of an estate in fee simple, entered in the Register Office, implied covenants for the quiet enjoyment of the lands against the bargainor, his heirs and assigns, and all claiming under him, and

(*l*) 3 & 4 Will. IV. c. 27, s. 39;
3 & 4 Will. IV. c. 74, s. 14.

(*m*) *Spencer's case*, 5 Rep. 17 a;
Bac. Ab. tit. Covenant (B); *Mostyn v. The West Mostyn Coal and
Iron Company, Limited*, 1 C. P. D.

145; see Williams's Conveyancing Statutes, 74, 76.

(*n*) *Noke's case*, 4 Rep. 80 b.

(*o*) See Co. Litt. 384 a, n. (1).

(*p*) *Bustard's case*, 4 Rep. 121 a.

OF TITLE.

also for further assurance thereof by the bargainor, his heirs and assigns, and all claiming under him, unless restrained by express words (*q*). The word *grant*, by virtue of some other Acts of Parliament, also implies covenants for the title (*r*). But the Act to amend the law of real property now provides that an exchange or a partition of any tenements or hereditaments made by deed shall not imply any condition in law; and that the word *give* or the word *grant* in a deed shall not imply any covenant in law in respect of any tenements or hereditaments, except so far as the word *give* or the word *grant* may by force of any Act of Parliament imply a covenant (*s*). The writer is not aware of any Act of Parliament by force of which the word *give* implies a covenant.

The absence of a warranty is principally supplied in modern times by a strict investigation of the title of the person who is to convey; although, in most cases, covenants for title, as they are termed, are also given to the purchaser. On the sale or mortgage of copyhold lands, these covenants are usually contained in a deed of covenant to surrender, by which the surrender itself immediately preceded (*t*), the whole being regarded as one transaction (*u*). By these covenants, the heirs of

(*q*) Stat. 6 Anne, c. 62 (c. 35 in Ruffhead), ss. 30, 34; 8 Geo. II. c. 6, s. 35.

(*r*) As in conveyances by companies under the Lands Clauses Consolidation Act, 1845, stat. 8 & 9 Vict. c. 18, s. 132; and in conveyances to the Governors of Queen Anne's Bounty, stat. 1 & 2 Vict. c. 20, s. 22. Conveyances by joint stock companies registered under the Joint Stock Companies Act, 1856 (now repealed), also implied covenants for title.

Stat. 19 & 20 Vict. c. 47, s. 46.

(*s*) Stat. 8 & 9 Vict. c. 17, s. 4, repealing 7 & 8 Vict. c. 7, s. 6.

(*t*) By the Stamp Act, 1870, stat. 33 & 34 Vict. c. 97, such a deed of covenant is now charged with a duty of 10s.; and if the *ad valorem* duty on the sale or mortgage is less than that sum, then a duty of equal amount only is payable.

(*u*) *Riddell v. Riddell*, 7 Sim. 529.

Heirs now
bound by
covenant
without ex-
press mention
of them
therein.

the vendor have been always expressly bound ; but, like all other similar contracts, they are binding on the heir or devisee of the covenantor to the extent only of the property which may descend to the one, or be devised to the other (*x*). It is not necessary expressly to bind the heirs of a vendor in covenants for title made after the 31st December, 1881. For, by the Conveyancing and Law of Property Act, 1881 (*y*), a covenant, and a contract under seal, and a bond or obligation under seal made after the 31st December, 1881, though not expressed to bind the heirs, shall, so far as a contrary intention is not expressed therein, and subject to the terms thereof, operate in law to bind the heirs and real estate, as if heirs were expressed. This enactment extends to a covenant implied by virtue of the same Act (*z*). As we shall see, since the commencement of the year 1882, the use of express covenants for title has been superseded by reliance on the covenants for title implied by virtue of this Act. Unlike the simple clause of warranty in ancient days, modern covenants for title were five and are now four in number, and few conveyancing forms exceeded them in the luxuriant growth to which their verbiage attained (*a*). The first covenant was, that the vendor is seised in fee simple ; the next, that he has good right to convey the lands ; the third, that they shall be quietly enjoyed ; the fourth, that they are free from incumbrances ; and the last, that the vendor and his heirs will make any further assurance for the conveyance of the premises which may reasonably be required. But during the last fifty years, before express covenants for title went out of use, the first covenant was usually omitted, the second being evidently quite sufficient without it ; and the length of

(*x*) Ante, pp. 103—106 ; see Williams's Conveyancing Statutes, 76, 77.

(*y*) Stat. 44 & 45 Vict. c. 41,

s. 59 ; see Williams's Conveyancing Statutes, 234, 235.

(*z*) Sect. 59, sub-s. 2.

(*a*) See Appendix (D).

the remaining covenants greatly diminished. Covenants for title vary in comprehensiveness, according to the circumstances of the case. A vendor never gives absolute covenants for the title to the lands he sells, but always limits his responsibility to the acts of those who have been in possession since the last sale of the estate; so that if the land should have been purchased by his father, and so have descended to the vendor, or have been left to him by his father's will, the covenants will extend only to the acts of his father and himself (*b*): but if the vendor should himself have purchased the lands, he will covenant only as to his own acts (*c*), and the purchaser must ascertain by an examination of the previous title, that the vendor purchased what he may properly re-sell. A mortgagor, on the other hand, always gives absolute covenants for title; for those who lend money are accustomed to require every possible security for its repayment; and, notwithstanding these absolute covenants, the title is investigated on every mortgage, with equal, and indeed with greater strictness, than on a purchase. When a sale is made by trustees, who have no beneficial interest in the property themselves, they merely covenant that they have respectively done no act to encumber the premises. If the money is to be paid over to A. or B. or any persons in fixed amounts, the persons who take the money are expected to covenant for the title (*d*); but, if the money belongs to infants or other persons who cannot covenant, or is to be applied in payment of debts or for any similar purpose, the purchaser must rely for the security of the title solely on the accuracy of his own investigation (*e*).

Covenants for title by a vendor.

Covenants for title by a mortgagor.

Covenants by trustees.

Certain covenants for title are implied by virtue

Covenants for title now

(*b*) Sugd. Vend. & Pur. 574, 14th ed.; see Williams's Conveyancing Statutes, 74, 75.

(*c*) See next chapter and Ap-

pendix (D).

(*d*) Sugd. Vend. & Pur. 574, 14th ed.

(*e*) Ibid.

implied by
statute in
certain cases.

of the 7th section of the Conveyancing and Law of Property Act, 1881, in certain cases upon conveyances made after the 31st December, 1881 (*f*). And it is now usual, in drawing deeds of conveyance, to rely upon the effect of this enactment, instead of inserting express covenants for title. The covenants so implied, and the cases in which they are implied, appear to be the following:—

(1) *In a conveyance for valuable consideration, other than a mortgage, covenants by a person who conveys and is expressed to convey as beneficial owner, for right to convey, for quiet enjoyment, for freedom from incumbrances, and for further assurance limited to the acts of the person who so conveys, and of any one through whom he derives title otherwise than by purchase for value. The expression “purchase for value” does not in this case include a conveyance in consideration of marriage (g):*

(2) *In a conveyance of leasehold property for valuable consideration, other than a mortgage, the same covenants by a person who conveys and is expressed to convey as beneficial owner as are implied in case (1) (h); and a further covenant that the lease is valid, that the rent has been paid, and that the covenants have been performed, limited to the acts of the person who so conveys, and of any one through whom he derives title otherwise than by purchase for value. Purchase for value has the same meaning in this case as in case (1) (i):*

(3) *In a conveyance by way of mortgage, absolute cove-*

(*f*) Stat. 44 & 45 Vict. c. 41, s. 7; see also sects. 59 (sub-s. 2), 60 (sub-s. 2), 64; Williams's Statutes, 74—93, 234, 236, 244.

(*g*) Sect. 7, sub-s. 1 (A); see Williams's Conveyancing Statutes, 74, 78—82.

(*h*) An assignment of leaseholds is included in case (1); see sect. 2; Williams's Conveyancing Statutes, 27, 83.

(*i*) Sect. 7, sub-s. 1 (B); see Williams's Conveyancing Statutes, 74, 78, 82,

nants for title *by a person who conveys and is expressed to convey as beneficial owner (k)* :

(4) *In a conveyance by way of mortgage of leasehold property, the same covenants by a person who conveys and is expressed to convey as beneficial owner as are implied in case (3) (l), and, in addition, an absolute covenant that the lease is valid, and covenants for payment of the rent reserved by, and performance of the covenants contained in the lease, so long as any money remains on the security of the conveyance, and to indemnify the mortgagor against loss by reason of non-payment of the rent or non-performance of the covenant (m) :*

(5) *In a conveyance by way of settlement, a covenant for further assurance by a person who conveys and is expressed to convey as settlor limited to the person so conveying, and every person deriving title under him by deed or act or operation of law in his lifetime subsequent to that conveyance, or by testamentary disposition or devolution in law on his death (n) :*

(6) *In any conveyance, a covenant against incumbrances by every person who conveys and is expressed to convey as trustee or mortgagee, or as personal representative of a deceased person, or as committee of a lunatic so found by inquisition, or under an order of the Court, which covenant is to be deemed to extend to every such person's own acts only (o) :*

(7) *Where in a conveyance it is expressed that*
tion of a person expressed to direct as beneficial owner
another person conveys, then the person giving the direc-
tion, whether he conveys and is expressed to convey

(k) Stat. 44 & 45 Vict. c. 41, s. 7, sub-s. 1 (C); see Williams's Conveyancing Statutes, 74, 78, 83-85.

(l) A mortgage of leaseholds is included in case (3); see sect. 2; Williams's Conveyancing Statutes, 27, 85.

(m) Sect. 7, sub-s. 1 (D); see

Williams's Conveyancing Statutes, 74, 78, 85.

(n) Sect. 7, sub-s. 1 (E); see Williams's Conveyancing Statutes, 74, 78, 86.

(o) Sect. 7, sub-s. 1 (F); see Williams's Conveyancing Statutes, 74, 78, 87.

as beneficial owner or not, is to be deemed to convey and to be expressed to convey as beneficial owner, and a covenant on his part is to be implied accordingly (*p*):

(8) *Where a wife conveys and is expressed to convey as beneficial owner, and the husband also conveys and is expressed to convey as beneficial owner, then the wife is to be deemed to convey and to be expressed to convey by direction of the husband, as beneficial owner; and, in addition to the covenant implied on the part of the wife, there is also to be implied, first, a covenant on the part of the husband as the person giving that direction, and, secondly, a covenant on the part of the husband in the same terms as the covenant implied on the part of the wife*

in
which cove-
nants for title
are not now
implied.

Copyholds.

Benefit of
implied cove-
nant to run
with the land.

Where in a conveyance made after the 31st December, 1881, a person conveying is *not expressed to convey* as beneficial owner, or as settlor, or as trustee, or as mortgagee, or as personal representative of a deceased person, or as committee of a lunatic so found by inquisition, or under an order of the Court, or by direction of a person as beneficial owner, no covenant on the part of the person conveying is to be implied in the conveyance by virtue of the 7th section of the above Act (*r*). In the same section a conveyance includes a deed conferring the right to admittance to copyhold or customary land, but does not include a demise by way of lease at a rent, or any customary assurance, other than a deed conferring the right to admittance to copyhold or customary land (*s*). The benefit of a covenant implied as aforesaid is to be annexed and

(*p*) Stat. 44 & 45 Vict. c. 41, s. 7, sub-s. 2; see Williams's Conveyancing Statutes, 87, 88.

(*q*) Sect. 7, sub-s. 3; see Williams's Conveyancing Statutes, 88—91.

(*r*) Sect. 7, sub-s. 4; see Williams's Conveyancing Statutes, 91.

(*s*) Sect. 7, sub-s. 5; see Williams's Conveyancing Statutes, 92.

incident to, and to go with, the estate or interest of the implied covenantee, and is to be capable of being enforced by every person in whom that estate or interest is, for the whole or any part thereof, from time to time vested (*t*). A covenant implied as aforesaid may be varied or extended by deed, and, as so varied or extended, is to operate, as far as may be, in the like manner, and with all the like incidents, effects and consequences, as if such variations or extensions were directed to be implied in the 7th section of the above Act (*u*). For further information as to the effect of this enactment and the employment of statutory covenants for title, the reader is referred to the editor's "Conveyancing Statutes" (*x*).

Covenant implied by statute may be varied by deed.

The period for which the title was formerly investigated was the last sixty years (*y*): and every vendor of freehold property was bound, at his own expense, to furnish the intended purchaser with an abstract of all the deeds, wills and other instruments which had been executed, with respect to the lands in question, during that period; and also to give him an opportunity of examining such abstract with the original deeds, and with the probates or office copies of the wills; for, in every agreement to sell was implied by law an agreement to make a good title to the property to be sold (*z*). The proper length of title to an advowson was, however, 100 years (*a*), as the presentations, which are the only fruits of the advowson, and, consequently, the only occasions when the title is likely to be contested, occur only at long intervals. On a purchase of copyhold

Sixty.

Advowson.

Copyholds.

(*t*) Stat. 44 & 45 Vict. c. 41, s. 7, sub-s. 6; see Williams's Conveyancing Statutes, 92, 93.

(*u*) Sect. 7, sub-s. 7; see Williams's Conveyancing Statutes, 93.

(*x*) Pages 74—93, 496—520.

(*y*) *Cooper v. Emery*, 1 Phill. 388; see Williams's Conveyancing Statutes, 2, 3.

(*z*) Sugd. Vend. & Pur. 16, 14th ed.

(*a*) Ibid. 367.

lands, an abstract of the copies of court roll, relating to the property for the last sixty years, was delivered to the purchaser. And even on a purchase of leasehold property, the purchaser was strictly entitled to a sixty years' title (*b*); that is, supposing the lease to have been granted within the last sixty years, so much of the title of the lessor was required to be produced as, with the title to the term since its commencement, would make up the full period of sixty years. If the lease were more than sixty years old, the lease was required to be produced or its absence accounted for, and evidence given of the whole of its contents (*c*). But intermediate assignments upwards of sixty years old were not required to be produced. The Vendor and Purchaser Act, 1874 (*d*), however, now provides (*e*) that in the completion of any contract of sale of land made after the 31st day of December, 1874, and subject to any stipulation to the contrary in the contract, forty years shall be substituted as the period of commencement of title which a purchaser may require, in place of sixty years, the present period of such commencement; nevertheless earlier title than forty years may be required in cases similar to those in which earlier title than sixty years may now be required. The Act uses the word "land," which has a statutory meaning when used in an Act of Parliament, including tenements and hereditaments of any tenure, unless there are words to restrict the meaning to tenements of some particular tenure (*f*).

Now, an advowson is certainly a hereditament; but as the Act substitutes the period of forty years "in place of sixty years, the present period," and as one hundred

Leaseholds.

New enactment.

Forty years' title now sufficient.

Act presumed

(*b*) *Purvis v. Rayer*, 9 Price, 3, 5.
488; *Souter v. Drake*, 5 B. & Adol. 992; see Williams's Conveyancing Statutes, 2, 4, 5.

(*c*) *Freud v. Buckley*, Ex. Ch., L. R., 5 Q. B. 213; see Williams's Conveyancing Statutes,

(*d*) Stat. 37 & 38 Vict. c. 78.

(*e*) Sect. 1; see Williams's Conveyancing Statutes, 2—4.

(*f*) Stat. 13 & 14 Vict. c. 21, s. 4; see Williams's Conveyancing Statutes, 1.

years and not sixty years was, when the Act passed, the proper period for the deduction of the title to an advowson, it is presumed that the Act was not intended to apply to advowsons, and that the title to an advowson must, therefore, still be deduced for one hundred years. The Act further provides (*g*), that in the completion of any such contract as aforesaid, and subject to any stipulation to the contrary in the contract, under a contract to grant or assign a term of years, whether derived or to be derived out of a freehold or leasehold estate, the intended lessee or assign shall not be entitled to call for the title to the freehold. The Act further provides (*h*), that in the completion of any such contract, and subject to any stipulation to the contrary, recitals, statements and descriptions of facts, matters and parties contained in deeds, instruments, Acts of Parliament, or statutory declarations twenty years old at the date of the contract, shall, unless and except so far as they shall be proved to be inaccurate, be taken to be sufficient evidence of the truth of such facts, matters and descriptions. The last provision adopts, as a general rule, a stipulation which had been usually inserted in conditions of sale, and in the absence of which the purchaser had a right to require evidence of the truth of the matters recited.

Grantee or

cannot now
call for title
to freehold.

It is not easy to say how the precise term of sixty years came to be fixed on as the time for which an abstract of the title should be required. It is true, that by a statute of the reign of Henry VIII. (*i*), the time within which a writ of right (a proceeding now abolished (*k*)) might be brought for the recovery of lands

Reason for
title.

Stat. 37 & 38 Vict. c. 78,
s. 2; see Williams's Conveyancing Statutes, 4—8.

(*h*) Sect. 2; see Williams's Conveyancing Statutes, 8—11.

(*i*) 32 Hen. VIII. c. 2; 3 Black. Com. 196.

(*k*) By stat. 3 & 4 Will. IV. c. 27, s. 36.

Duration of
human life.

was limited to sixty years; but still in the case of remainders after estates for life or in tail, this statute did not prevent the recovery of lands long after the period of sixty years had elapsed from the time of a conveyance by the tenant for life or in tail; for it is evident, that the right of a remainderman, after an estate for life or in tail, to the possession of the lands does not accrue until the determination of the particular estate (*l*). A remainder after an estate tail may, however, be barred by the proper means; but a remainder after a mere life estate cannot. The ordinary duration of human life was therefore, if not the origin of the rule requiring a sixty years' title, at least a good reason for its continuance. For, so long as the law permits of vested remainders after estates for life, and forbids the tenant for life, by any act, to destroy such remainders, so long must it be necessary to carry the title back to such a point as will afford a reasonable presumption that the first person mentioned as having conveyed the property was not a tenant for life merely, but a tenant in fee simple (*m*). The recent shortening of the period from sixty to forty years appears justifiable only from the fact that in practice purchasers are generally found willing to accept a forty years' title; in like manner as, in the purchase of leasehold estates, a condition to dispense with the title to the freehold was usually submitted to.

Rights of
vendors and
purchasers on
sales made
after the 31st
Dec. 1881,
in the absence
of express
stipulation to
the contrary.

As regard to the rights of vendors and purchasers on sales of land made after the 31st December, 1881, further alterations were made in the law by the 3rd section of the Conveyancing and Law of Property Act, 1881 (*n*). This section, however, applies only if and as far as a contrary intention is not expressed

(*l*) Ante, pp. 300—302. See Sugd. Vend. & Pur. 609, 11th ed.

(*m*) See Mr. Brodie's opinion, 1 Hayes's Conveyancing, 564;

Sugd. Vend. & Pur. 365, 14th ed.

(*n*) Stat. 44 & 45 Vict. c. 41; see Williams's Conveyancing Statutes, 29—54.

in the contract of sale, and has effect subject to the terms thereof (*o*). It is therein enacted as follows:—

(Sub-sect. 1.) Under a contract to sell and assign a term of years derived out of a leasehold interest in land, the intended assign shall not have the right to call for the title to the leasehold reversion

Contract for sale and assignment of

(Sub-sect. 2.) Where land of copyhold or customary tenure has been converted into freehold by enfranchisement, then, under a contract to sell and convey the freehold, the purchaser shall not have the right to call for the title to make the enfranchisement (*q*).

Sale of land, formerly copyhold, which has been enfranchised.

(Sub-sect. 3.) A purchaser of any property shall not require the production, or any abstract or copy of any deed, will or other document, dated or made before the time prescribed by law, or stipulated for commencement of the title, even though the same creates a power subsequently exercised by an instrument abstracted in the abstract furnished to the purchaser; nor shall he require any information, or make any requisition, objection or inquiry, with respect to any such deed, will or document, or the title prior to that time, notwithstanding that any such deed, will or other document, or that prior title, is recited, covenanted to be produced, or noticed; and he shall assume, unless the contrary appears, that the recitals contained in the abstracted instruments of any deed, will or other document, forming part of that prior title, are correct, and give all the material contents of the deed, will or other document so recited, and that every document so recited was duly executed by all necessary parties, and perfected, if and as required, by fine, recovery, acknowledgment, enrolment or otherwise (*r*).

Purchaser cannot require production of documents of title dated before time of commencement of title; or make any objection or inquiry with respect to them.

even though he have notice of them.

Purchaser to assume that such documents of title are correctly

and were in all respects perfected.

Sect. 3, sub-s. 9; see Williams' Conveyancing Statutes, 50—52.

(*p*) See Williams' Conveyanc-

ing Statutes, 29—31.

(*q*) See Williams' Conveyancing Statutes, 31.

(*r*) Ibid.

Sale of lease-holds.

(Sub-sect. 4.) Where land sold is held by lease (not including under-lease) the purchaser shall assume, unless the contrary appears, that the lease was duly granted; and on production of the receipt for the last payment due for rent under the lease before the date of actual completion of the purchase, he shall assume, unless the contrary appears, that all the covenants and provisions of the lease have been duly performed and observed up to the date of actual completion of the purchase (s).

Sale of under-lease.

(Sub-sect. 5.) Where land sold is held by under-lease, the purchaser shall assume, unless the contrary appears, that the under-lease and every superior lease were duly granted; and, on production of the receipt for the last payment due for rent under the under-lease before the date of actual completion of the purchase, he shall assume, unless the contrary appears, that all the covenants and provisions of the under-lease have been duly performed and observed up to the date of actual completion of the purchase, and further that all rent due under every superior lease, and all the covenants and provisions of every superior lease, have been paid and duly performed and observed up to that

Purchaser to bear the expenses of inspection of documents of title not in vendor's possession—and of all journeys incidental thereto—and of procuring all evidence of title not in

(Sub-sect. 6.) On a sale of any property, the expenses of the production and inspection of all Acts of Parliament, inclosure awards, records, proceedings of Courts, Court rolls, deeds, wills, probates, letters of administration, and other documents, not in the vendor's possession, and the expenses of all journeys incidental to such production or inspection, and the expenses of searching for, procuring, making, verifying, and producing all certificates, declarations, evidences, and information not in the vendor's possession, and all at-

(s) See Williams's Conveyancing Statutes, 41—45.

(t) Ibid.

tested, stamped, office or other copies or abstracts of, or extracts from, any Acts of Parliament or other documents aforesaid, not in the vendor's possession, if any such production, inspection, journey, search, procuring, making, or verifying is required by a purchaser, either for verification of the abstract, or for any other purpose, shall be borne by the purchaser who requires the same; and where the vendor retains possession of any document, the expenses of making any copy thereof, attested or unattested, which a purchaser requires to be delivered to him shall be borne by that purchaser (u).

vendor's

copies, &c. of such documents of title—
if required by him,

for other purposes—
and of all copies of documents of title retained by vendor.

Sale of property in lots.

(Sub-sect. 7.) On a sale of any property in lots, a purchaser of two or more lots, held wholly or partly under the same title, shall not have a right to more than one abstract of the common title, except at his own expense (x).

(Sub-sect. 11.) Nothing in this section shall be construed as binding a purchaser to complete his purchase in any case where, on a contract made independently of this section, and containing stipulations similar to the provisions of this section, or any of them, specific performance of the contract would not be enforced against him by the Court (y).

Rights of purchaser in case of action for specific performance

Stipulations similar to the provisions of the Conveyancing and Law of Property Act, 1881, quoted above, were, previously to the commencement of that Act, usually inserted by vendors in contracts and conditions of sale, with the object of preventing the assertion of rights to which a purchaser would otherwise have been entitled (z). The general effect of the above enactments is that upon an open contract, that is, in the absence of any special stipulations, the rights of the purchaser are considerably curtailed, while the vendor is relieved from

(u) See Williams's Conveyancing Statutes, 47—50.

(x) Ibid. p. 50.

(y) Ibid. pp. 52—54.

W.R.P.

(z) Davidson, Prec. Conv. vol. i. 506, 607, 623; vol. ii. 13, 16, 4th

many obligations previously imposed upon him by law. As these provisions now form part of every contract for the sale of land, unless expressly excluded, they are of great importance, and should be thoroughly understood by every intending practitioner. The editor has attempted to explain their effect in detail in his "Conveyancing Statutes" (*a*).

Contract to grant an underlease made after 31st Dec., 1881.

By the 13th section of the same Act, on a contract, made after the 31st December, 1881 (*b*), to grant a lease for a term of years to be derived out of a leasehold interest, with a leasehold reversion, the intended lessee shall not have the right to call for the title to that reversion (*c*). But this section applies only if and as far as a contrary intention is not expressed in the contract, and has effect subject to the terms thereof (*d*).

Concurrence of parties interested.

abstract of the title will of course disclose the names of all parties, who, besides the vendor, may be interested in the lands; and, if he desire to complete the sale without resorting to the aid of the Court, the concurrence of these parties must be obtained by him, in order that an unincumbered estate in fee simple may be conveyed to the purchaser. Thus, if the lands be in mortgage, the mortgagee must be paid off out of the purchase-money, and must join to relinquish his security and convey the legal estate (*e*). If the

of any previous owner is entitled to dower out of the lands (*f*), she must concur in the conveyance; if the lands are subject to a rent-charge (*g*), the person entitled thereto must join to release the lands from his charge. By the 5th section of the Conveyancing and Law of Property Act, 1881 (*h*), upon sales of land subject to

(*a*)¹ Pages 29—54.

(*b*) Stat. 44 & 45 Vict. c. 41, s. 13, sub-s. 3.

(*c*) See Williams's Conveyancing Statutes, 113.

(*d*) Sect. 13, sub-s. 2.

(*e*) Ante, p. 502.

(*f*) Ante, pp. 281—287.

(*g*) Ante, p. 383.

(*h*) Stat. 44 & 45 Vict. c. 41; see Williams's Conveyancing Statutes, 58—60.

any incumbrance (*i*) made or to be completed after the 31st December, 1881 (*k*), the Court may, if it thinks fit, **Money** on the application of any party to the sale, direct or allow payment into Court, in case of an annual sum charged on the land, or of a capital sum charged on a determinable interest in the land, of such amount as, **may now be paid into Court—** when invested in government securities, the Court considers will be sufficient, by means of the dividends thereof, to keep down or otherwise provide for that charge; and in any other case of capital money charged on the land, of the amount sufficient to meet the incumbrance and any interest due thereon; but in either case there is also to be paid into Court such additional amount as the Court considers will be sufficient to meet **to a suit vide costs, &c.** the contingency of further costs, expenses, and interest, and any other contingency, except depreciation of investments, not exceeding one-tenth part of the original amount to be paid in, unless the Court for special reason think fit to require a larger additional amount. Thereupon, the Court may, if it thinks fit, and either **Court may thereupon declare land to be freed from incumbrance.** after or without any notice to the incumbrancer (*l*), as the Court thinks fit, declare the land to be freed from the incumbrance, and make any order for conveyance, or vesting order, proper for giving effect to the sale, and give directions for the retention and investment of the money in Court (*m*). After notice served on the persons interested in or entitled to the money or fund in Court, the Court may direct payment or transfer **The money in Court may be ordered to be paid to the persons entitled thereto.** thereof to the persons entitled to receive or give a discharge for the same, and generally may give directions respecting the application or distribution of the capital or income thereof (*n*).

(*i*) By sect. 2 (vii), incumbrance includes a mortgage in fee, or for a less estate, and a trust for securing money, and a lien, and a charge of a portion, annuity, or

other capital or annual sum.

(*k*) Sect. 5, sub-ss. 1, 4.

(*l*) See sect. 2 (vii).

(*m*) Sect. 5, sub-s. 2.

(*n*) Sect. 5, sub-s. 3.

Application
of purchase-
money.

New enact-
ment.

Receipt for
money, securi-
ties and other
personal pro-
perty, now a
good dis-
charge.

When lands were sold by trustees, and the money was directed to be paid over by them to certain given persons, it was formerly obligatory on the purchaser to see that such persons were actually paid the money to which they were entitled, unless it were expressly provided by the instrument creating the trust, that the receipt of the trustees alone should be an effectual discharge (o). The duty thus imposed being often exceedingly inconvenient, and tending greatly to prejudice a sale, a declaration, that the receipt of the trustees should be an effectual discharge, was usually inserted, as a common form, in all settlements and trust deeds. By Lord St. Leonards' Act, it was enacted that the *bonâ fide* payment to and the receipt of any person to whom any purchase or mortgage money should be payable upon any express or implied trust, should effectually discharge the person paying the same from seeing to the application or being answerable for the misapplication thereof, unless the contrary should be expressly declared by the instrument creating the trust or security (p). A further provision that trustees' receipts should be a sufficient discharge was contained in Lord Cranworth's Act (q). This enactment, however, extended only to instruments executed after the passing of the Act, the 28th August, 1860. It was repealed by the Conveyancing and Law of Property Act, 1881 (r), by the 36th section of which it is enacted that the receipt in writing of any trustees or trustee for any money, securities or other personal property or effects payable, transferable or deliverable to them or him under any trust or power shall be a sufficient discharge for the same, and shall effectually exonerate the person paying, transferring or delivering the same from seeing to the

(o) Sugd. Vend. & Pur. 657
et seq., 14th ed.; see Williams's

Conveyancing Statutes, 189.

(p) Stat. 22 & 23 Vict. c. 35,
s. 23.

Stat. 23 & 24 Vict. c. 145,
s. 29.

(r) Stat. 44 & 45 Vict. c. 41,

s. 71.

application or being answerable for any loss or misapplication thereof. This enactment applies to trusts created either before or after the commencement of the Act (*).

Supposing that through carelessness in investigating the title, or from any other cause, a man should happen to become possessed of lands, to which some other person is rightfully entitled; in this case it is evidently desirable that the person so rightfully entitled to the lands should be limited in the time during which he may bring an action to recover them. To deprive a man of that which he has long enjoyed, and still expects to enjoy, will be generally doing more harm than can arise from forbidding the person rightfully entitled, but who has long been ignorant or negligent as to his rights, to agitate claims which have long lain dormant. Various Acts for the limitation of actions and suits relating to real property have accordingly been passed at different times (†). By a statute of the reign of George III. (‡) the rights of the Crown in all lands and hereditaments are barred after the lapse of sixty years. With respect to other persons, the Act which was in force until the 1st of January, 1879 (x), was passed in the reign of King William IV., at the suggestion of the Real Property Commissioners. By this Act, no person could bring an action for the recovery of lands but within twenty years next after the time at which the right to bring such action should have first accrued to him, or to some person through whom he claimed (y);

Statutes of
Limitation.

Stat. 3 & 4
Will. IV.
c. 27.

(*) Sect. 36, sub-s. 2: see Williams's Conveyancing Statutes, 189—191.

(†) See 3 Black. Com. 196, 306, 307; stat. 21 Jac. I. c. 16; Sugd. Vend. & Pur. 608 et seq. 11th ed.

(‡) Stat. 9 Geo. III. c. 16, amended by stat. 24 & 25 Vict. c. 62, and extended to the Duke of Cornwall by stats. 23 & 24

Vict. c. 63, and 24 & 25 Vict. c. 62, s. 2, and extended to Ireland by stat. 39 & 40 Vict. c. 37.

(x) Stat. 3 & 4 Will. IV. c. 27, amended as to mortgagees by stat. 7 Will. IV. & 1 Vict. c. 28.

(y) Stat. 3 & 4 Will. IV. c. 27, s. 2. See *Nepean v. Doe*, 2 Mee. & Wels. 894.

and, as to estates in reversion or remainder, or other future estates, the right was deemed to have first accrued at the time at which any such estate became an estate in possession (*s*). But a written acknowledgment of the title of the person entitled, given to him or his agent, signed by the person in possession, extended the time of claim to twenty years from such acknowledgment (*t*). If, however, when the right to bring an action first accrued, the person entitled should have been under disability to sue by reason of infancy, coverture (if a woman), idiocy, lunacy, unsoundness of mind, or absence beyond seas, ten years were allowed from the time when the person entitled should have ceased to be under any disability, or should have died, notwithstanding the period of twenty years above mentioned might have expired (*u*), yet so that the whole period did not, including the time of disability, exceed forty years (*x*); and no further time was allowed on account of the disability of any other person than the one to whom the right of trust. action first accrued (*y*). When any land or rent was vested in a trustee upon any express trust, the right of the *cestui que trust*, or any party claiming through him to bring a suit against the trustee, or any person claiming through him, to recover such land or rent, was deemed to have first accrued at and not before the time at which such land or rent should have been conveyed to a purchaser for a valuable consideration, and was then deemed to have accrued only as against such purchaser and any person claiming through him (*z*). And it was

| Stat. 3 & 4 Will. IV. c. 27,
s. 3. See *Doe d. Johnson v. Liver-*
sedge, 11 Mee. & Wels. 517.

(*t*) Sect. 14. See *Doe d. Curzon*
v. Edmonds, 6 Mee. & Wels. 295;
Sanders v. Sanders, 19 Ch. D. 373.

(*u*) Sect. 16; *Borrows v. Ellison*,
L. R., 6 Exch. 128.

(*x*) Sect. 17.

(*y*) Sect. 18.

(*z*) Sect. 25; *Commissioners of*
Charitable Donations v. Wybrants,
2 Jones & Lat. 182; *Cox v. Dol-*
man, 2 De Gex, M. & G. 592;
Snow v. Booth, 2 K. & J. 132;
affirmed 8 De Gex, M. & G. 69.

enacted by the Supreme Court of Judicature Act, 1873 (a), that no claim of a *cestui que trust* against his trustee for any property held on an express trust, or in respect of any breach of such trust, should be held to be barred by any Statute of Limitations. The Act of King William IV. further provided (b), that in every case of a concealed fraud, the right of any person to bring a suit in Equity for the recovery of any land or rent, of which he, or any person through whom he claimed, might have been deprived by such fraud, should be deemed to have first accrued at and not before the time at which such fraud should, or with reasonable diligence might, have been (c) first known or discovered; provided that nothing in that clause contained should enable any owner of lands or rents to have a suit in Equity for the recovery thereof, or for setting aside any conveyance thereof on account of fraud, against any *bonâ fide* purchaser for valuable consideration, who had not assisted in the commission of such fraud, and who at the time he made the purchase did not know and had no reason to believe that any such fraud had been committed (d). And nothing in the Act contained was to be deemed to interfere with any rule or jurisdiction of Courts of Equity in refusing relief, on the ground of acquiescence or otherwise, to any person whose right to bring a suit might not have been barred by virtue of that Act (e). The Act further provided, that whenever a mortgagee had obtained possession of the land comprised in his mortgage, the mortgagor should not bring a suit to redeem the mortgage but within twenty years next after the time when the mortgagee obtained possession, or next after

fraud.

Mortgagee in

(a) Stat. 36 & 37 Vict. c. 66, s. 25, sub-s. (2).

(b) Stat. 3 & 4 Will. IV. c. 27, s. 26; *Sturgis v. More*, 24 Beav. 541; affirmed 3 De Gex & Jo. 1.

(c) *Chatham v. Hoare*, L. R., 9 Eq. 571.

(d) *Vane v. Vane*, L. R., 8 Ch. 383.

(e) Stat. 3 & 4 Will. IV. c. 27, s. 27.

Advowson.

Judgments.

Legacies.

Rents.

Tithes.

any written acknowledgment of the title of the mortgagor, or of his right to redemption, should have been given to him or his agent, signed by the mortgagee (*f*). It has been held that the provision of the Act allowing further time to persons under certain disabilities (*g*) does not apply to the case of a mortgagor seeking to redeem lands of which a mortgagee is in possession (*h*). By the same Act the time for bringing an action or suit to enforce the right of presentation to a benefice was limited to three successive incumbencies, all adverse to the right of presentation claimed, or to the period of sixty years, if the three incumbencies did not together amount to that time (*i*); but whatever the length of the incumbencies, no such action or suit could be brought after the expiration of 100 years from the time at which adverse possession of the benefice should have been obtained (*k*). Money secured by mortgage or judgment, or otherwise charged upon land, and also legacies, were to be deemed satisfied at the end of twenty years, if no interest should have been paid, or written acknowledgment given in the meantime (*l*). The right to rents, whether rents service or rents charge, and also the right to tithes when in the hands of laymen (*m*), was subject to the same period of limitation as the right to land (*n*).

(*f*) Stat. 3 & 4 Will. IV. c. 27, s. 28. See *Hyde v. Dallaway*, 2 Hare, 528; *Trulock v. R* 12 Sim. 402; *Lucas v. Dennison*, 13 Sim. 514; *Stansfield v. Hobson*, 16 Beav. 236.

(*g*) Sect. 16, ante, p. 550.

(*h*) *Kinsman v. Rouse*, 17 Ch. D. 104; *Forster v. Patterson*, ib. 132.

(*i*) Sect. 30.

(*k*) Sect. 33.

(*l*) Sect. 40. This section extended to legacies payable out of personal estate; *Sheppard v. Duke*, 9 Sim. 567. And in this case absence beyond seas was no dis-

ability. Stat. 19 & 20 Vict. c. 97, s. 10.

(*m*) *Dean of Ely v. Bliss*, 2 De Gex, M. & G. 459.

(*n*) Stat. 3 & 4 Will. IV. c. 27, s. 1. As to the time required to support a claim of *modus decimandi*, or exemption from or discharge of tithes, see stat. 2 & 3 Will. IV. c. 100, amended by stat. 4 & 5 Will. IV. c. 83; *Salkeld v. Johnston*, 1 Mac. & Gord. 242. The circumstances under which lands may be tithe free are well explained in Burton's Compendium, ch. 6, sect. 4.

And in every case where the period limited by the Act was determined, the right of the person who might have brought any action or suit for the recovery of the land, rent or advowson in question within the period, was extinguished (*o*). An amending Act of the present reign (*p*) provided that, notwithstanding anything in the former Act, any person claiming under any mortgage of land might make an entry or bring an action at law or suit in equity to recover such land at any time within twenty years next after the last payment of any part of the principal money or interest secured by such mortgage, although more than twenty years might have elapsed since the time at which the right to make such entry or bring such action or suit should have first accrued (*q*). A mortgagee's right to bring an action for foreclosure (*r*) was held to be limited by the statute of Will. IV. as so amended

A new Statute of Limitations has now been passed (*l*), which came into operation on the 1st of January, 1879 (*u*). It is called the Real Property Limitation Act, 1874 (*x*). This Act shortens the period of twenty years given by the Act of Will. IV. to twelve years (*y*). It also shortens further the time allowed to estates in reversion or remainder or other future estates, in cases where time has begun to run against the owner of the particular estate; giving twelve years only from that time, or six years from the vesting in possession, whichever period shall

(*o*) Stat. 3 & 4 Will. IV. c. 27, s. 34; *Scott v. Nixon*, 3 Dru. & War. 388; *De Beauvoir v. Owen*, 5 Ex. Rep. 166; *Sands to Thompson*, 22 Ch. D. 614.

(*p*) Stat. 1 Vict. c. 28. See *Harlock v. Ashberry*, 19 Ch. D.

(*q*) As to the right of a mortgagee, who has obtained a decree for foreclosure absolute, to recover

possession, see *Heath v. Pugh*, 6 Q. B. D. 345; 7 App. Cas. 235.

(*r*) Ante, p. 508.

(*s*) *Wrixon v. Fize*, 3 Dru. & War. 104, 119; *Harlock v. Ashberry*, 19 Ch. D. 539.

(*t*) Stat. 37 & 38 Vict. c. 57.

(*u*) Sect. 12.

(*x*) Sect. 11.

(*y*) Sects. 1, 6, 7, 8.

trust
of money or
legacy
charged on
land.

be the longer; and if the particular tenant is barred, every reversioner claiming under any deed, will or settlement, executed or taking effect after the time when the right first accrued to the particular tenant is barred also (z). The period of ten years allowed by the former statute in cases of disability is shortened to six years (a). And absence beyond seas is removed from the list of disabilities (b). The total period of forty years allowed by the former Act is reduced to thirty (c). And the law as to express trusts (d) is again altered by an enactment that, after the commencement of that Act, no action, suit or other proceeding shall be brought to recover any sum of money or legacy charged upon or payable out of any land or rent at law or in equity, and secured by an express trust, or to recover any arrears of rent or of interest in respect of any sum of money or legacy so charged or payable and so secured, or any damages in respect of such arrears, except within the time within which the same would be recoverable if there were not any such trust (e).

Prescription.
Legal
memory.

The title to incorporeal rights, whether appendant, appurtenant or in gross, depends upon grant or upon prescription from immemorial user, by which a grant is implied. The time of legal memory was long since fixed at the beginning of the reign of King Richard I., by analogy to the time which, by a statute of Edward I. (f), was fixed for the limitation of the old writ of right (g). And in the absence of an express grant, a man might either prescribe that he and his ancestors had from time immemorial exercised a certain

(z) Stat. 37 & 38 Vict. c. 57,
s. 2.

(a) Sect. 3.

(b) Sect. 4.

(c) Sect. 5.

(d) See ante, p. 550.

Sect. 10.

(f) Stat. of Westminster the
First, 3 Edw. I. c. 39.

(g) Litt. sect. 170; 2 Inst. 238;
2 Bl. Com. 31. See ante, p. 541.

right in gross (*h*), or that he, being seised in fee of certain lands, and all those whose estate he had, had from time immemorial exercised as appendant or appurtenant to their own lands certain rights, such as rights of common or way, over certain other lands (*i*). In both of these cases proof of a user as of right, for twenty years or upwards, was formerly considered to afford a presumption of immemorial enjoyment (*k*). But this presumption might be effectually rebutted by proof that the enjoyment had in fact commenced within the time of legal memory (*l*); in which case the enjoyment for centuries would go for nothing. This is still the law with regard to prescriptions of the former kind, namely, prescriptions of immemorial user by a man and his ancestors (*m*). But with regard to prescriptions of the latter kind, where the owner of one tenement, sometimes called the dominant tenement, claims to exercise some right over another tenement, called the servient tenement, he may either still prove his rights as before (*n*), or he may have recourse to an Act of King William IV. (*o*), which has materially shortened the proof required, in all cases where a recent uninterrupted user as of right can be shown. By this Act no right of common or other profit or benefit, called in law-French *profit à prendre*, to be taken and enjoyed from or upon land (except tithes, rent and services), shall, if actually taken and enjoyed by any person claiming right thereto without interruption for thirty years, be defeated by showing only that it was first enjoyed prior thereto; and if enjoyed for sixty years the right is made absolute

The Prescrip-
tion Act.

Rights of
common, &c.

(*h*) *Welcome v. Upton*, 6 Mee. & Wels. 536; *Shuttleworth v. Le Fleming*, 19 C. B., N. S. 687.

(*i*) *Gateward's case*, 6 Rep. 59 b.

(*k*) *Rex v. Joliffe*, 2 Barn. & Cres. 64.

(*l*) See *Jenkins v. Harvey*, 1 L., Mee. & Roac. 894, 895.

(*m*) *Shuttleworth v. Le Fleming*, ubi supra.

(*n*) *Warriek v. Queen's College, Oxford*, L. R., 6 Ch. 716, 728; *Aynsley v. Glover*, L. R., 10 Ch. 283.

(*o*) Stat. 2 & 3 Will. IV. c. 71.

Rights of
way, &c.

Light.

Disabilities,
&c.

and indefeasible, unless it shall appear that the same was taken and enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing (*p*). For rights of way and other easements, watercourses and the use of water, the terms are twenty and forty years respectively instead of thirty and sixty years (*q*). And when the access and use of light for any dwelling-house, workshop, or other building, shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing (*r*). The periods mentioned are periods next before some action or suit in which the claim is brought in question; and no act is deemed an interruption unless submitted to or acquiesced in for one year after the party interrupted shall have had notice thereof and of the person making or authorizing the same to be made (*s*). The time during which any person, otherwise capable of resisting any claim, shall be an infant, idiot, *non compos mentis*, *feme covert* or tenant for life, or during which any action or suit shall have been pending, and which shall have been diligently prosecuted until abated by the death of any party thereto, is excluded from the above periods, except when the claim is declared absolute and indefeasible (*t*); provided that in the case of ways and watercourses where the servient tenement shall be held for term of life or years exceeding three years, the time of enjoyment of the way or watercourse during such term is excluded from the computation of the period of forty years, in

(*p*) Stat. 2 & 3 Will. IV. c. 71,
s. 1.

(*q*) Sect. 2.

(*r*) Sect. 3.

(*s*) Sect. 4; *Bennison v. Cartwright*, 5 Best & Smith, 1.

(*t*) Sect. 7.

case the claim shall, within three years next after the end or sooner determination of such term, be resisted by any person entitled to any reversion expectant on the determination thereof (*u*). The rights above mentioned may be lost by abandonment, of which non-user for twenty years or upwards is generally sufficient evidence, although a shorter period will suffice if an intent to abandon appear (*x*). Abandonment.

On any sale or mortgage of lands, all the title deeds Title in the hands of the vendor or mortgagor, which relate exclusively to the property sold or mortgaged, are handed over to the purchaser or mortgagee. The possession of the deeds is of the greatest importance; for of their possession. if the deeds were not required to be delivered, it is evident that property might be sold or mortgaged over and over again to different persons, without much risk of discovery. The only guarantee, for instance, which a purchaser has that the lands he contracts to purchase have not been mortgaged, is that the deeds are in the possession of the vendor. It is true that in the counties of Middlesex and York, registries have been established, a search in which will lead to the detection of all dealings with the property (*y*); but these registries, though existing in Scotland and Ireland, do not extend to the remaining counties of England or to Wales. Generally speaking, therefore, the possession of the deeds is all that a purchaser has to depend on: in most cases, this protection, coupled with an examination of the title they disclose, is found to be sufficient: but there are certain circumstances in which the possession of the

(*u*) Sect. 8.

(*x*) *Moore v. Rawson*, 3 Barn. & Cres. 332, 339; *The Queen v. Chorley*, 12 Q. B. 515, 519; *Crossley v. Lightowler*, L. R., 3 Eq. 279; 2 Ch. 478. For further information as to the law of pre-

scriptive rights, the reader is referred to the author's *Lectures on Rights of Common and other Prescriptive Rights*, now published.

(*y*) See ante, pp. 231—233, 523—525.

Possession of

a rent-charge ;

nor against the vendor being tenant for life only.

deeds can afford no security. Thus, the possession of the deeds is no safeguard against an annuity or rent-charge payable out of the lands ; for the grantee of a rent-charge has no right to the deeds (z). So the possession of the deeds, showing the conveyance to the vendor of an estate in fee simple, is no guarantee that the vendor is not now actually seised only of a life estate ; for, since he acquired the property, he may, very possibly, have married ; and on his marriage he may have settled the lands on himself for his life, with remainder to his children. Being then tenant for life, he will, like every other tenant for life, be entitled to the custody of the deeds (a) ; and if he should be fraudulent enough to suppress the settlement, he might make a conveyance from himself, as though seised in fee, deducing a good title, and handing over the deeds ; but the purchaser, having actually acquired by his purchase nothing more than the life interest of the vendor, would be liable, on his decease, to be turned out of possession by his children ; for, as marriage is a valuable consideration, a settlement then made cannot be set aside by a subsequent sale made by the settlor. Against such a fraud as this the registration of deeds seems the only protection. In some cases, also, persons are entitled to an interest, which they would like to sell, but are pre-

(s) The author once met with an instance in which lands were, from pure inadvertence, sold as free from incumbrance, when in fact they were subject to a rent-charge, which had been granted by the vendor on his marriage to secure the payment of the premiums of a policy of insurance on his life. The marriage settlement was, as usual, prepared by the solicitor for the wife ; and the vendor's solicitor, who conducted the sale, but had never

seen the settlement, was not aware that any charge had been made on the lands. The vendor, a person of the highest respectability, was, as often happens, ignorant of the legal effect of the settlement he had signed. The charge was fortunately discovered by accident shortly before the completion of the sale.

(a) Sugd. Vend. & Pur. 445, n. (1), 14th ed. ; *Leathes v. 5 Ch. D. 221.*

vented, from not having any deeds to hand over. Thus, if lands be settled on A. for his life, with remainder to B. in fee, A. during his life will be entitled to the deeds; and B. will find great difficulty in disposing of his reversion at an adequate price; because, having no deeds to give up, he has no means of satisfying a purchaser that the reversion has not previously been sold or mortgaged to some other person. If, therefore, B.'s necessities should oblige him to sell, he will find the want of a registry for deeds the cause of a considerable deduction in the price he can obtain. It may here be remarked, that as few people would sell a reversion unless they were in difficulties, equity, whenever a reversion was sold, threw upon the purchaser the onus of showing that he gave the fair market price for it (b). But it is now provided that no purchase, made *bond fide*, and without fraud or unfair dealing, of any reversionary interest in real or personal estate shall hereafter be opened or set aside merely on the ground of undervalue (c).

Difficulty in sale of a reversion, want of dence that no previous

Sale of sions.

New enactment.

Again, if lands are in mortgage, there may be a difficulty in dealing with them on account of the absence of title deeds. For a mortgagee under a mortgage made before the 1st January, 1882, who has possession of the title deeds of the mortgaged property, cannot, as a general rule, be compelled to produce them for the inspection of the mortgagor, or any one claiming through him, without being paid off (d). With regard, how-

Mortgagor could not inspect deeds in possession of mortgagee, except by consent.

(b) *Lord Aldborough v. Trye*, 7 Cl. & Fin. 436; *Davies v. Cooper*, 6 My. & Cr. 270; Sugd. Vend. & Pur. 278, 14th ed.; *Edwards v. Burt*, 2 De Gex, M. & G. 55.

(c) Stat. 31 Vict. c. 4. See *Lord Aylesford v. Morris*, L. R., 8 Ch. 484; *O'Rourke v. Bolingbroke*, 2 App. Cas. 814.

(d) *Chichester v. Marquis of Donegall*, L. R., 6 Ch. 457; Sugd. Vend. & Pur. 430; 445, 14th ed. See 1 Dart, Vend. & Pur. 411, 5th ed.; Seton on Decrees, 1058, 4th ed.; Davidson, Prec. Conv. Vol. II., Part II., p. 251, 4th ed.

New enact-
ment.

ever, to mortgages made after the 31st December, 1881, it is provided by the 16th section of the Conveyancing and Law of Property Act, 1881 (*e*), which has effect notwithstanding any stipulations to the contrary, that a mortgagor, as long as his right to redeem subsists, shall, by virtue of that Act, be entitled, at his own cost, to inspect and make copies or abstracts of or extracts from the documents of title relating to the mortgaged property in the custody or power of the mortgagee.

Attested
copies.

Where the title deeds related to other property, and could not consequently be delivered over to the purchaser, he formerly was entitled, at the expense of the vendor, to attested copies of such of them as were not enrolled in any Court of record (*f*); but as the expense thus incurred was usually great, it was in general thrown on the purchaser, by express stipulation in the contract. Upon sales made after the 31st December, 1881, this expense is, as we have seen, thrown by law on the purchaser, in the absence of stipulation to the contrary (*g*).

Covenant to
produce
deeds.

The purchaser was also formerly entitled to a covenant for the production of the title deeds, whenever required in support of his title (*h*); and the expense of this covenant formerly fell on the vendor, unless thrown on the purchaser by express stipulation. But the Vendor and Purchaser Act, 1874 (*i*), now provides (*k*) that in the com-

New enact-
ment.

(*e*) Stat. 44 & 45 Vict. c. 41; see Williams's Conveyancing Statutes, 124.

(*f*) Sugd. Vend. & Pur. 446 et seq., 14th ed.

(*g*) Stat. 44 & 45 Vict. c. 41, s. 3, sub-s. 6; ante, p. 545; see Williams's Conveyancing Statutes, 47, 48.

(*h*) Sugd. Vend. & Pur. 450, 14th ed.; *Cooper v. Emery*, 10 Sim. 609; see Williams's Conveyancing Statutes, 12, 14. By the

Stamp Act, 1870 (stat. 33 & 34 Vict. c. 97), the stamp duty on a separate deed of covenant for the production of title deeds on a sale or mortgage is 10s.; and if the *ad valorem* duty on the sale or mortgage is less than that sum, then a duty of equal amount only is payable. See ante, pp. 229, 500.

(*i*) Stat. 37 & 38 Vict. c. 78.

(*k*) Sect. 2. See Williams's Conveyancing Statutes, 12—15.

pletion of any contract of sale of land made after the 31st of December, 1874, and subject to any stipulation to the contrary in the contract, the inability of the vendor to furnish the purchaser with a legal covenant to produce and furnish copies of documents of title shall not be an objection to title, in case the purchaser will, on the completion of the contract, have an equitable right to the production of such documents (*l*) ; and further that such covenants for production as the purchaser can and shall require shall be furnished at his expense, but the vendor shall bear the expense of perusal, and execution on behalf of and by himself and necessary parties, other than the purchaser ; and further that when the vendor retains any part of an estate to which any documents of title relate, he shall be entitled to retain such documents. A covenant for the production of title-deeds will run, as it is said, with the land ; that is, the benefit of such a covenant will belong to every legal owner of the land sold for the time being ; and the better opinion is, that the obligation to perform the covenant will also be binding on every legal owner of the land, in respect of which the deeds have been retained (*m*). Accordingly, whenever a purchase was made without delivery of the title-deeds, the only deeds that could accompany the lands sold were the actual conveyance of the land to the purchaser, and the deed of covenant to produce the former title-deeds. On any subsequent sale these deeds were delivered to the new purchaser ; and the covenant running with the land, enabled him at any time to obtain production of the former deeds to which the covenant related.

Covenant to
prod
runs
land

An acknowledgment in writing of right to production of documents, and to delivery of copies thereof, given

of documents.

(*l*) See Sugd. Vend. & Pur. 12, 13.
452, 455, 14th ed. ; 1 Dart, Vend. (m) Sugd. Vend. & Pur. 453,
& Pur. 142, 143, 5th ed. ; Wil- 14th ed.
liams's Conveyancing Statutes,

in accordance with the provisions of the 9th section of the Conveyancing and Law of Property Act, 1881 (*n*), is now usually substituted for a covenant for production. The 9th section runs as follows :—

(Sub-sect. 1.) Where a person retains possession of documents, and gives to another *an acknowledgment in writing of the right of that other to production of those documents, and to delivery of copies thereof* (in this section called an acknowledgment), that acknowledgment shall have effect as in this section provided.

(Sub-sect. 2.) An acknowledgment shall bind the documents to which it relates in the possession or under the control of the person who retains them, and in the possession or under the control of every other person having possession or control thereof from time to time, but shall bind each individual possessor or person as long only as he has possession or control thereof; and every person so having possession or control from time to time shall be bound specifically to perform the obligations imposed under this section by an acknowledgment, unless prevented from so doing by fire or other inevitable accident.

(Sub-sect. 3.) The obligations imposed under this section by an acknowledgment are to be performed from time to time at the request in writing of the person to whom an acknowledgment is given, or of any person, not being a lessee at a rent, having or claiming any estate, interest, or right through or under that person, or otherwise becoming through or under that person interested in or affected by the terms of any document to which the acknowledgment relates.

(Sub-sect. 4.) The obligations imposed under this section by an acknowledgment are—

(i.) An obligation to produce the documents or any of them at all reasonable times for the purpose of inspection, and of comparison with abstracts or copies

(*n*) Stat. 44 & 45 Vict. c. 41; see Williams's Conveyancing Statutes, 94—103.

thereof, by the person entitled to request production, or by any one by him authorized in writing; and

(ii.) An obligation to produce the documents or any of them at any trial, hearing, or examination in any Court, or in the execution of any commission, or elsewhere in the United Kingdom, on any occasion on which production may properly be required, for proving or supporting the title or claim of the person entitled to request production, or for any other purpose relative to that title or claim; and

(iii.) An obligation to deliver to the person entitled to request the same true copies or extracts, attested or unattested, of or from the documents or any of them.

(Sub-sect. 5.) All costs and expenses of or incidental to the specific performance of any obligation imposed under this section by an acknowledgment, shall be paid by the person requesting performance.

(Sub-sect. 6.) An acknowledgment shall not confer any right to damages for loss or destruction of, or injury to, the documents to which it relates, from whatever cause arising.

(Sub-sect. 7.) Any person claiming to be entitled to the benefit of an acknowledgment, may apply to the Court for an order directing the production of the documents to which it relates, or any of them, or the delivery of copies of or extracts from those documents or any of them to him, or some person on his behalf; and the Court may, if it thinks fit, order production, or production and delivery, accordingly, and may give directions respecting the time, place, terms, and mode of production or delivery, and may make such order as it thinks fit respecting the costs of the application, or any other matter connected with the application.

(Sub-sect. 8.) An acknowledgment shall by virtue of this Act satisfy any liability to give a covenant for production and delivery of copies of or extracts from documents.

Undertaking

(Sub-sect. 9.) Where a person retains possession of documents and gives to another *an undertaking in writing for safe custody* thereof, that undertaking shall impose on the person giving it, and on every person having possession or control of the documents from time to time, but on each individual possessor or person as long only as he has possession or control thereof, an obligation to keep the documents safe, whole, uncanceled, and undefaced, unless prevented from so doing by fire or other inevitable accident.

(Sub-sect. 10.) Any person claiming to be entitled to the benefit of such an undertaking may apply to the Court to assess damages for any loss, destruction of, or injury to, the documents or any of them, and the Court may, if it thinks fit, direct an inquiry respecting the amount of damages, and order payment thereof by the person liable, and may make such order as it thinks fit respecting the costs of the application, or any other matter connected with the application.

(Sub-sect. 11.) An undertaking for safe custody of documents shall by virtue of this Act satisfy any liability to give a covenant for safe custody of documents.

(Sub-sect. 12.) The rights conferred by an acknowledgment or an undertaking under this section shall be in addition to all such other rights relative to the production, or inspection, or the obtaining of copies of documents as are not, by virtue of this Act, satisfied by the giving of the acknowledgment or undertaking, and shall have effect subject to the terms of the acknowledgment or undertaking, and to any provisions therein contained.

(Sub-sect. 13.) This section applies only if and as far as a contrary intention is not expressed in the acknowledgment or undertaking.

(Sub-sect. 14.) This section applies only to an acknowledgment or undertaking given, or a liability respecting documents incurred, after the commencement of this Act (o).

(o) After the 31st December, 1881 ; sect. 1, sub-s. 2.

When the lands sold are situated in either of the Search in counties of Middlesex or York, search is made in the registries established for those counties (*p*); this search is usually confined to the period which has elapsed from the last purchase-deed,—the search presumed to have been made on behalf of the former purchaser being generally relied on as a sufficient guarantee against latent incumbrances prior to that time; and a memorial of the purchase-deed is of course duly registered as soon as possible after its execution. As to lands in all other counties, also, there are certain matters affecting the title, of which every purchaser can readily obtain information. Thus, if any estate tail has existed in the lands, the purchaser can always learn whether or not it has been barred; for the records of all fines and recoveries, by which the bar was formerly effected (*q*), are preserved in the Public Record Office (*r*); and the deeds, which have been substituted for those assurances, were required to be enrolled in the Court of Chancery (*s*). The Enrolment Office, formerly attached to the Court of Chancery, was in the year 1879 amalgamated with the Central Office of the Supreme Court (*t*), where such deeds are now enrolled (*u*), and where an official search for such deeds may now be directed to be made, and a certificate of the result obtained (*x*). Conveyances executed by married women under the provisions of the Act for the abolition of fines and recoveries before the

fines, recoveries, and

Deeds acknowledged by married women the year

(*p*) Ante, pp. 231—233. By stat. 47 & 48 Vict. c. 54, ss. 20—23, 31, provision is made for official search in the Yorkshire registers and the issue of a certificate of the result of such a search.

(*q*) Ante, pp. 67, 70.

(*r*) Established by stat. 1 & 2 Vict. c. 92.

(*s*) Ante, pp. 70, 71. As to fines and recoveries in Wales and Cheshire, see stat. 5 & 6 Vict. c. 32.

(*t*) Stat. 42 & 43 Vict. c. 78, s. 5.

(*u*) Rules of the Supreme Court, 1883, Ord. LXI. r. 9.

(*x*) Ord. LXI. r. 23; see Williams's Conveyancing Statutes, 273, 274.

Crown and
judgment
debts.

Life annui-
ties.

Official search

year 1883 can also be discovered by a search in the index of the certificates of the acknowledgment of such deeds (*y*). This index is now kept at the Central Office of the Supreme Court; and an official search therein may be directed to be made, and a certificate of the result obtained (*z*). So we have seen that debts due from the vendor, or any former owner, to the crown, prior to the 1st of November, 1865 (*a*), or secured by judgment prior to the 23rd of July, 1860 (*b*), together with suits which may be pending concerning the land (*c*), all which are incumbrances on the land, are always sought for in the indexes provided for the purpose, which have all been transferred to the same Central Office (*d*). Life annuities, also, which may have been charged on the land for money or money's worth prior to August, 1854, may generally be discovered by a search amongst the memorials of such annuities (*e*). And those which have been granted since the 26th of April, 1855, otherwise than by marriage-settlement or will, may be found in the registry established therefor, now transferred to the Central Office (*f*). As we have seen (*g*), under the Conveyancing Act, 1882 (*h*), official searches may now be directed to be made in the Central

See ante, pp. 279, 280 ;
Williams's Conveyancing Sta-
tutes, 281—285.

(*z*) See stat. 45 & 46 Vict. c. 39,
ss. 2, 7 ; Rules of the Supreme
Court, 1883, Ord. LXI. r. 23 ;
Williams's Conveyancing Sta-
tutes, 262, 263, 268, 270, 273,
281—285, 477—479, 483, 486,
490, 491.

(*a*) Ante, pp. 115—117.

(*b*) Ante, pp. 110—114.

(*c*) Ante, p. 117.

(*d*) Ante, pp. 114, 117 ; see
Williams's Conveyancing Sta-
tutes, 263—268.

(*e*) Ante, p. 384. The lands
charged are not, however, neces-
sarily mentioned in the memorial.
This search was formerly made
in the Enrolment Office attached
to the Court of Chancery, which
is now amalgamated with the
Central Office of the Supreme
Court. An official search for
these annuities may now be
directed under Ord. LXI. r. 23 ;
see ante, p. 565.

(*f*) Ante, p. 384.

(*g*) Ante, pp. 117, 118.

(*h*) Stat. 45 & 46 Vict. c. 39,
s. 2 ; see Williams's Conveyanc-
ing Statutes, 262—274, 479—491.

Office for entries of judgments, deeds, or other matters or documents, whereof entries are required or allowed to be made in that office by any statute; and a certificate of the result of any such search may be obtained. And such a certificate will be conclusive in favour of a purchaser as defined in the Act (*i*), as against persons interested under or in respect of any such judgments, deeds, or other matters or documents (*k*). But these provisions of the Act do not apply to deeds enrolled under the Act for the abolition of fines and recoveries, or under any other Act, or under any statutory rule (*l*). Lastly, the bankruptcy or insolvency of any vendor or mortgagor may be discovered by a search in the records of the Bankrupt or Insolvent Courts; and it is the duty of the purchaser's or mortgagee's solicitor to make such search if he has any reason to believe that the vendor or mortgagor is or has been in embarrassed circumstances (*m*). The Acts for relief of insolvent debtors were repealed and the Court finally abolished in the year 1869 (*n*). Bankruptcy or insolvency.

Some mention should here be made of the Acts which have been passed with a view to the simplification of titles and to facilitate the transfer of land. An Act has been passed "for obtaining a declaration of title" (*o*). Act for obtaining a declaration of title. This Act empowers persons claiming to be entitled to land in possession for an estate in fee simple, or claiming power to dispose of such an estate, to apply to the Court of Chancery, now represented by the Chancery Division of the High Court, by petition in a summary way for a declaration of title. The title is then investigated by

(*i*) See ante, p. 118, note (*a*).

(*k*) Sect. 2, sub-s. 3; ante, p. 118; see Williams's Conveyancing Statutes, 262, 271.

(*l*) Sect. 2, sub-s. 11; see Williams's Conveyancing Sta-

tutes, 262, 273, 274.

(*m*) *Cooper v. Stephenson*, Q. B., 16 Jur. 424; 21 L. J., Q. B. 292.

(*n*) Stat. 32 & 33 Vict. c. 83.

(*o*) Stat. 25 & 26 Vict. c. 67.

Act to facilitate the proof of title to and conveyance of real estates.

The Land Act,

the Court; and if the Court shall be satisfied that such a title is shown as it would have compelled an unwilling purchaser to accept, an order is made establishing the title, subject, however, to appeal as mentioned in the Act. This Act, though seldom resorted to, does not appear to have been repealed. Another Act of the same session is intituled "An Act to facilitate the Proof of Title to and the Conveyance of Real Estates" (*p*). This Act established an office of land registry, and contained provisions for the official investigation of titles, and for the registration of such as appeared to be good and marketable. It has, however, now been superseded by the Land Transfer Act, 1875 (*q*), which provides (*r*) that after the commencement of that Act, which took place on the 1st of January, 1876 (*s*), application for the registration of an estate under the former Act shall not be entertained. For the provisions of this Act reference should be made to the Act itself. Registration under this Act is optional, and its success is too doubtful to justify any lengthened account of it in an elementary work like the present. The system of official investigation of title once for all is a good one, provided it be made by competent persons and under sufficient safeguards. Compensation, however, ought to be made to those whose estates may by any error be taken from them in their absence. When land is once registered under this Act, it ceases, if situate in Middlesex or Yorkshire, to be subject to the county registry of deeds (*t*). If the Act should lead to an efficient system of registration of assurances throughout the kingdom, it would, in the author's opinion, be the means of conferring a great benefit on the community. This, however, cannot be advantageously done without resort to the printing of registered deeds and of probates of wills, and the abo-

(*p*) Stat. 25 & 26 Vict. c. 53.

(*s*) Sect. 3.

(*q*) Stat. 38 & 39 Vict. c. 87.

(*t*) Sect. 127.

(*r*) Sect. 125.

lition of payment by length. The author's views on this subject will be found in a paper read by him before the Juridical Society, on the 24th of March, 1862, intituled "On the true Remedies for the Evils which affect the Transfer of Land" (u), and to which he begs to refer the reader.

Such is a very brief and exceedingly imperfect outline of the methods adopted in this country for rendering secure the enjoyment of real property when sold or mortgaged. It may perhaps serve to prepare the student for the course of study which still lies before him in this direction. The valuable treatises of Lord St. Leonards and of Mr. Dart on the law of vendors and purchasers of estates will be found to afford nearly all the practical information necessary on this branch of the law. The title to purely personal property depends on other principles, for an explanation of which the reader is referred to the author's treatise on the principles of the law of personal property. From what has already been said, the reader will perceive that the law of England has two different systems of rules for regulating the enjoyment and transfer of property; that the laws of real estate, though venerable for their antiquity, are in the same degree ill adapted to the requirements of modern society: whilst the laws of personal property, being of more recent origin, are proportionably suited to modern times. Over them both has arisen the jurisdiction of the Court of Chancery, by means of which the ancient strictness and simplicity of our real property laws have been in a measure rendered subservient to the arrangements and modifications of ownership, which the various necessities of society have required. Added to this have been continual enactments, especially of late years, by which many of the

(u) Published in a separate form, by H. Sweet & Sons, 3, Chancery Lane.

most glaring evils have been remedied, but by which, at the same time, the symmetry of the laws of real property has been greatly impaired. Those laws cannot indeed be now said to form a system: their present state is certainly not that in which they can remain. For the future, perhaps, the wisest course to be followed would be to aim as far as possible at a uniformity of system in the laws of both kinds of property; and, for this purpose, rather to take the laws of personal estate as the model to which the laws of real estate should be made to conform, than on the one hand to preserve untouched all the ancient rules, because they once were useful, or on the other, to be annually plucking off, by parliamentary enactments, the fruit which such rules must, until eradicated, necessarily produce.

PART VI.

OF THE PRESENT FORM OF A CONVEYANCE.

THE student, having read the chapter on Title, is now in a position to understand all the clauses usual in an ordinary deed of conveyance upon sale of the kind in use previously to the commencement of the Conveyancing and Law of Property Act, 1881 (*a*), and to consider the changes which are made in the form of a deed of the same nature when the provisions of the Act are relied on. The following precedent is the conveyance requisite before the 1st January, 1882, to complete a simple transaction of sale of a piece of land by a vendor who purchased it himself (*b*), and is entitled thereto for an unincumbered estate in fee simple. For convenience of examination each clause is printed in a separate paragraph.

“ THIS INDENTURE made the 31st day of December 1881 (*c*) Date.

“ BETWEEN A. B. of Cheapside in the city of London Parties.
 “ esquire of the one part and C. D. of Lincoln’s Inn in
 “ the county of Middlesex esquire of the other part

“ WITNESSETH (*d*) that in consideration (*e*) of the Testatum.

(*a*) Stat. 44 & 45 Vict. c. 41, which commenced immediately after the 31st Dec., 1881. See ante, pp. 226, 227, 240—242.

(*b*) Ante, p. 535.

(*c*) Ante, pp. 181, 233, 234.

(*d*) Recitals are unnecessary in such a simple case as the present.

Any special matters, of which it is desirable to preserve evidence, *e. g.*, the descent of the estate upon the intestacy of a previous owner, should always be recited with a view to stat. 37 & 38 Vict. c. 78, s. 2; ante, p. 541.

(*e*) Ante, pp. 178, 180, 195, 224.

Consideration.	" sum of one thousand pounds upon the execution of
Nature of transaction.	" these presents paid by the said C. D. to the said " A. B. for the purchase of the fee simple in possession of the hereditaments hereinafter expressed to be
Receipt.	" hereby granted (the receipt of which sum the said
Operative words.	" A. B. doth hereby acknowledge) the said A. B. doth " hereby grant (<i>f</i>) unto the said C. D. and his heirs
Parcels.	" ALL THAT messuage or tenement [<i>insert description of the property</i>]
General words.	" TOGETHER WITH all buildings fixtures lights commons fences ways waters watercourses easements and appurtenances whatsoever to the said hereditaments or any of them appertaining or with the same or any of them now or heretofore enjoyed or reputed as part thereof or appurtenant thereto (<i>g</i>)
Estate clause.	" AND ALL THE ESTATE right title interest claim and demand of the said A. B. in to and upon the said premises
Habendum.	" TO HAVE AND TO HOLD the said premises herein-
To the use of the purchaser.	" before expressed to be hereby granted UNTO AND TO
In fee simple.	" THE USE (<i>h</i>) of the said C. D. his heirs and assigns for ever (<i>i</i>)
Covenants for title:	" AND THE SAID A. B. doth hereby for himself his heirs executors and administrators covenant with the said C. D. his heirs and assigns (<i>k</i>)
1. For right to convey.	" THAT notwithstanding anything by him the said A. B. (<i>l</i>) done omitted or knowingly suffered he now hath power to grant the said premises hereinbefore expressed to be hereby granted to the use of the said C. D. his heirs and assigns
2. For quiet enjoyment.	" AND THAT the same premises shall at all times remain and be to the use of the said C. D. his heirs and

(*f*) Ante, pp. 217, 242.(*g*) Ante, p. 381.(*h*) Ante, pp. 178, 189, 224.(*i*) Ante, pp. 174, 175. As to omitting any declaration to bar

dower, see p. 286.

(*k*) Ante, pp. 533, 534.(*l*) A. B. covenants against his own acts only. Ante, pp. 535, 571.

“ assigns and be quietly entered into and upon and held
 “ and enjoyed and the rents and profits thereof received
 “ by him and them accordingly without any interrup-
 “ tion or disturbance by the said A. B. or any person
 “ claiming through or in trust for him

“ AND THAT (*m*) free and discharged from or other- 3. Free
 “ wise by him the said A. B. his heirs executors or incum-
 “ administrators sufficiently indemnified against all brances.
 “ estates incumbrances claims and demands created
 “ occasioned or made by him or any person claiming
 “ through or in trust for him

“ AND FURTHER that he and every person having or 4. For further
 “ claiming any estate or interest in the said premises
 “ through or in trust for him will at all times at the cost
 “ of the person or persons requiring the same execute
 “ and do every such assurance and thing for the further
 “ or more perfectly assuring all or any of the said pre-
 “ mises to the use of the said C. D. his heirs and assigns
 “ as by him or them shall be reasonably required.

“ IN WITNESS &c.” (*n*).

The references given in the notes to the above form are to those parts of the book, where may be found the reasons for inserting in a deed of conveyance the clauses or words to which a note is appended.

If the reader will turn to Appendix (D), he will observe that the frame of the precedent given above is the same as that of the old release: although recitals are dispensed with in the former, and the clauses conveying the reversion, &c. and the title deeds are omitted as being unnecessary (*o*), as well as the covenant that

(*m*) The word *that* is here a pronoun.

(*n*) Ante, p. 228.

(*o*) Title deeds pass on a conveyance of the land, to which

they relate, without being expressly mentioned. *Harrington v. Price*, 3 B. & Ad. 170. See *Williams on Personal Property*, p. 10, 12th ed.

the vendor is seised in fee (*p*). The reader will also be able to mark how the old common forms became, in the course of time, shorn of their exuberant verbiage. The release in Appendix (D) exhibits them in all their ancient luxuriance; a perusal of it will repay the curious student. "There is an orientality about it we cannot rise up to."

Conveyance
made after
the 31st De-
cember, 1881.

Let us now suppose that a simple transaction of sale of land exactly similar to those, to which the deeds given above and in Appendix (D) relate, is to be completed at the present time. In drawing our conveyance, we may then rely on the following provisions of the Conveyancing and Law of Property Act, 1881 (*q*), which apply only to conveyances made after the 31st December, 1881 (*r*):

Conveyance
of land passes
advantages in
the nature of
easements
enjoyed with
the land at
the time of
conveyance.

(Section 6, sub-sect. 1.) A conveyance of land shall be deemed to include and shall by virtue of this Act operate to convey, with the land, all buildings, erections, fixtures, commons, hedges, ditches, fences, ways, waters, watercourses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, or any part thereof, or at the time of conveyance demised, occupied or enjoyed with, or reputed or known as part or parcel of or appurtenant to the land or any part thereof (*s*).

(Section 6, sub-sect. 2.) A conveyance of land, having houses or other buildings thereon, shall be deemed to include and shall by virtue of this Act operate to convey, with the land, houses, or other buildings, all outhouses, erections, fixtures, cellars, areas, courts, courtyards, cisterns, sewers, gutters, drains, ways, passages, lights, watercourses, liberties, privileges, easements, rights, and

(*p*) *Ante*, p. 534.

(*q*) Stat. 44 & 45 Vict. c. 41.

(*r*) Sects. 6 (sub-s. 6), 7 (sub-s.

8), 63 (sub-s. 3).

(*s*) See Williams's Conveyancing Statutes, 60—69, 73.

advantages whatsoever, appertaining or reputed to appertain to the land, houses, or other buildings conveyed, or any of them, or any part thereof, or at the time of conveyance demised, occupied, or enjoyed with, or reputed or known as part or parcel of, or appurtenant to, the land, houses, or other buildings conveyed, or any of them, or any part thereof (*t*).

(Section 63, sub-sect. 1.) Every conveyance shall, by virtue of this Act, be effectual to pass all the estate, right, title, interest, claim and demand which the conveying parties respectively have in, to, or on the property conveyed, or expressed or intended so to be, or which they respectively have power to convey in, to, or on the same (*u*). and interest of the party conveying.

Sections 6 and 63 apply only if and as far as a contrary intention is not expressed in the conveyance, and have effect subject to the terms of the conveyance and to the provisions therein contained (*r*).

(Section 7, sub-sect. 1.) In a conveyance there shall, Covenants
in the several cases in this section mentioned, be deemed to be included, and there shall *in those several cases*, by a conveyance in certain cases.
virtue of this Act, be implied, a covenant to the effect in this section stated, by the person [or by each person] who conveys, as far as regards the subject-matter or share of subject-matter *expressed to be conveyed by him*, with the person, if one, to whom the conveyance is made, [or with the persons jointly, if more than one, to whom the conveyance is made as joint tenants, or with each of the persons, if more than one, to whom the conveyance is made as tenants in common,] *that is to say* :

(A) *In a conveyance for valuable consideration, other than a mortgage, the following covenant by a person who* Case in which

(*t*) See Williams's Conveyancing Statutes, 70, 73.

(*r*) Sects. 6 (sub-s. 4), 63 (sub-s. 2).

(*u*) Ibid.

conveys and is expressed to convey as beneficial owner (namely) (w) :

for right to
convey ;

That, notwithstanding anything by the person who so conveys, [or any one through whom he derives title, otherwise than by purchase for value,] made, done, executed or omitted, or knowingly suffered, the person who so conveys, has, [with the concurrence of every other person, if any, conveying by his direction,] full power to convey the subject-matter expressed to be conveyed, [subject as, if so expressed, and] in the manner in which, it is expressed to be conveyed ;

for quiet en-
joyment ;

and that, notwithstanding anything as aforesaid, that subject-matter shall remain to and be quietly entered upon, received, and held, occupied, enjoyed, and taken, by the person to whom the conveyance is expressed to be made, and any person deriving title under him, and the benefit thereof shall be received and taken accordingly, without any lawful interruption or disturbance by the person who so conveys [or any person conveying by his direction,] or rightfully claiming or to claim by, through, under or in trust for the person who so conveys, [or any person conveying by his direction, or by, through or under any one not being a person claiming in respect of an estate or interest subject whereto the conveyance is expressly made, through whom the person who so conveys derives title, otherwise than by purchase for value] ;

free from in-
cumbrances ;

and that, freed and discharged from, or otherwise by the person who so conveys sufficiently indemnified against, all such estates, incumbrances, claims and demands [other than those subject to which the conveyance is expressly made,] as either before or after the date of the conveyance have been or shall be made, occasioned or suffered by that person [or by any person conveying

(w) For covenants implied in other cases, see ante, pp. 536—538.

by his direction,] or by any person rightfully claiming by, through, under, or in trust for the person who so conveys, [or by, through or under any person conveying by his direction, or by, through or under any one through whom the person who so conveys derives title, otherwise than by purchase for value];

and further, that the person who so conveys, [and any person conveying by his direction,] and every other person having, or rightfully claiming any estate or interest in the subject-matter of conveyance, [other than an estate or interest subject whereto the conveyance is expressly made,] by, through, under, or in trust for the person who so conveys, [or by, through, or under any person conveying by his direction, or by, through or under any one through whom the person who so conveys derives title otherwise than by purchase for value,] will from time to time and at all times after the date of the conveyance, on the request and at the cost of any person to whom the conveyance is expressed to be made, or of any person deriving title under him, execute and do all such lawful assurances and things for further or more perfectly assuring the subject-matter of the conveyance to the person to whom the conveyance is made, and to those deriving title under him, [subject as, if so expressed, and] in the manner in which the conveyance is expressed to be made, as by him or them or any of them shall be reasonably required :

(in which covenant a purchase for value shall not be deemed to include a conveyance in consideration of marriage) (x).

In considering the above enactments, regard must be had to the following provisions of the interpretation clause of the Act :

Sect. 2 (ii). Land, unless a contrary intention appears, Interpretation of terms.

(x) See Williams's Conveyancing Statutes, 74—82. The words enclosed within brackets [] are

those which are not material to the conveyance we are about to consider.

W. R. P.

includes land of any tenure, and tenements and hereditaments, corporeal or incorporeal, and houses and other buildings, also an undivided share in land :

(v) Conveyance, unless a contrary intention appears, includes assignment, appointment, lease, settlement and other assurance, and covenant to surrender, made by deed, on a sale, mortgage, demise, or settlement of any property, or on any other dealing with or for any property; and convey, unless a contrary intention appears, has a meaning corresponding with that of conveyance.

Reason for
use of *general*
words.

The reader will remember that, before the 6th section of the above Act came into operation, it was unnecessary on a conveyance of land expressly to grant rights legally appurtenant thereto, although the practice was to include such rights in the *general words* (y); and that the only real use of *general words* in a conveyance was to grant, as rights or easements, advantages used in connection with the land conveyed as a matter of fact, without being rights legally appurtenant thereto (z). For example, suppose that a man has two plots of land, plot A. and plot B., and is accustomed to use for the benefit of plot A. an artificial watercourse carried over plot B., or a road over plot B. These advantages cannot be rights or easements appurtenant to plot A., for they are exercised over plot B.: and no man can have an easement over his own land. But if plot A. were to be sold alone and conveyed to a purchaser "together with all watercourses, ways and advantages therewith used and enjoyed," according to recent decisions, these words would operate to grant, as rights or easements, the advantages, in the nature of easements, at the time of conveyance as a matter of fact used over plot B. for the benefit of plot A., although

(y) See ante, pp. 381, 572.

65; Williams on Commons, 168

(z) Ante, pp. 380, 381; see Wil-

—170.

liams's Conveyancing Statutes,

the same never previously existed as of right or as legal easements (a). Having regard to these decisions, it is considered that the object formerly sought to be effected by the insertion of *general words* in a conveyance, will now be attained by the operation of the 6th section of the Conveyancing and Law of Property Act, 1881 (b). It will be observed that the above section only operates to convey advantages enjoyed with the land conveyed at the time of conveyance. Apparently it would not extend to grant, as rights, advantages enjoyed with the land conveyed at some previous time, but not proved to have been so enjoyed at the time of conveyance (c).

With reference to the insertion of an *estate clause* in conveyances, the opinion of an eminent conveyancer (d) may be quoted:—"This clause is inserted in almost every instrument of alienation, where the entire interest of the conveying parties is transferred, on the alleged ground, that it is necessary to pass any outstanding particular estate or interest which may happen to be vested in any of the conveying parties, distinct from the estate or interest which such party purports to convey. No such ground, however, does exist, and the clause, though established by such long and unbroken practice, that it will hardly be eradicated by less than an Act of Parliament, is wholly unnecessary. Even at law it will not pass any interest which appears by the context of the deed was not intended to be passed" (e). The 63rd section of the Conveyancing and Law of Property Act, 1881 (f),

Re-use clause

Date.

Parties.

Testatum.

Consideration.

Nature of transaction.

Receipt.

Operative words.

(a) *Watts v. Kelson*, L. R., 6 Ch. 166; *Kay v. Oxley*, L. R., 10 Q. B. 360; *Barkshire v. Grubb*, 18 Ch. D. 616; see *Williams's Conveyancing Statutes*, 65; *Williams on Commons*, 315—319, 323.

(b) Stat. 44 & 45 Vict. c. 41.

(c) See *Williams's Conveyancing Statutes*, 68, 69.

(d) Mr. Davidson. 89, 195,

(e) *Davidson's Prec.* vol. i. 94, 4th ed.

(f) Stat. 44 & 45 Vict. c. 41, s. 63, p. 575.

appears to incorporate in every conveyance (*h*) this provision, formerly considered to be unnecessary, is probably not the kind of enactment contemplated by Mr. Davidson when writing the above. The question does not appear to be, whether the estate clause may be now safely omitted from a conveyance, so much as whether a declaration, that the above 63rd section shall not apply, ought not to be inserted in every conveyance. The old *estate clause*, however, was construed as being subservient to the intention of the parties as gathered from the terms of the conveyance (*i*); and the 63rd section of the Act is to have effect subject to the terms of the conveyance (*k*). In the opinion of the editor such a declaration is therefore unnecessary.

Reason for
use of general
words.

We now come to consider the incorporation into our conveyance of the statutory covenants for title. According to our supposition, A. B., the vendor, purchased himself the land he is about to convey. He will, therefore, covenant as to his own acts only (*l*). If we turn to section 7, sub-sect. 1 (A), of the Conveyancing Law of Property Act, 1881 (*m*), which is set out (*n*), we may extract therefrom covenants for title suited to our present requirements. As the enactment in question may be found somewhat intricate by so much of it as is unnecessary for our purpose has been enclosed within brackets. The covenants enclosed within brackets do not apply to the conveyance we are now considering for the following reasons:—Our conveyance is to be made by one person only, and not to joint tenants or tenants in common; A. B., the person conveying, pur-

see sect. 2 (v), ante, p. 578.
or easements, *Francis v. Moorson*, L. R., 3
used over; *Rooper v. Harrison*, 2
113.

(y)
(z)
liams'

(k) Sect. 63, sub-sect. 2, ante, p. 575; see also Williams's Conveyancing Statutes, 242—244.

(l) Ante, pp. 535, 571.

(m) Stat. 44 & 45 Vict. c. 41.

(n) Ante, pp. 575—577.

OF THE PRESENT FORM OF A CONVEYANCE.

chased the land himself, and, therefore, he does not “derive title through any one otherwise than by purchase for value;” there is no one concurring in the conveyance by the direction of A. B.; and the conveyance is not expressly made subject to any estate, interest or incumbrance. If the above enactment be read straight through, leaving out the words within brackets, its provisions will be found to correspond with the terms of the covenants for title in the form of conveyance given above (o). The conditions to be fulfilled in order that the required covenants may be “deemed to be included” in our conveyance, and implied by law upon the execution thereof, appear to be (1) that the conveyance must be a conveyance for valuable consideration other than a mortgage (p), and (2) that the person intended to be bound by the implied covenants must convey and be expressed to convey as beneficial owner (q). Our conveyance will then take the following form:—

“THIS INDENTURE made the 1st day of January Date.
“1882

“BETWEEN A. B. of Cheapside in the City of London Parties.
“Esquire of the one part and C. D. of Lincoln’s Inn in
“the County of Middlesex Esquire of the other part

“WITNESSETH that in consideration (r) of the sum of	Testatum.
“one thousand pounds paid by the said C. D. to the said	Consideration.
“A. B. for the purchase of the fee simple in possession	Nature of transaction.
“of the hereditaments hereinafter described (the receipt	
“of which sum the said A. B. doth hereby acknow-	Receipt.
“ledge) (s) the said A. B. as <i>beneficial owner</i> (t) doth	Operative words.
“hereby grant (u) unto the said C. D.	

(o) Ante, p. 572.

(p) Different covenants are implied by the use of the words *as beneficial owner* in different conveyances; e.g., in a mortgage absolute covenants for title are thereby implied. See sect. 7, sub-sect. 1 (A), (B), (C), (D);

ante, pp. 536, 537.

(q) Sect. 7, sub-sects. 1 (A), 4; ante, pp. 536, 538, 575.

(r) Ante, pp. 178, 189, 195, 224.

(s) Ante, p. 229.

(t) Ante, pp. 240, 241, 575.

(u) Ante, pp. 217, 242.

- Parcels. "ALL THAT messuage or tenement [*insert description of the property*]
- Habendum. "TO HAVE AND TO HOLD unto and TO THE USE (z) of
 "the said C. D. in fee simple (a)
 "IN WITNESS, &c." (b).

The references, as before, are to those parts of the book where the reasons for inserting the words used may be found.

The above form of conveyance is certainly shorter than that previously given (c); and similar forms are now generally adopted in practice. But it can hardly be said that the rights and obligations of the parties to a conveyance may be determined with increased accuracy or simplicity by a deed relying on the provisions of the Conveyancing and Law of Property Act, 1881 (d). The student, when he proceeds to practise drafting, should never forget that a deed is not an end in itself, but is only a means for ascertaining the rights and obligations of the parties thereto. His object should be to define those rights and obligations clearly and accurately, rather than briefly or even concisely. It is of course unnecessary that he should express what is clearly implied by law; but not the least important part of his task is to satisfy himself that the law clearly defines those rights and obligations for which he omits to provide.

It is beyond the scope of the present Work to consider the provisions of the Conveyancing and Law of Property Act, 1881 (d), with reference to conveyances more complicated than the above. Every intending draftsman must necessarily make acquaintance with the

(z) Ante, pp. 178, 189, 224.

(a) Ante, pp. 175, 176.

(b) Ante, p. 228.

(c) Ante, p. 571.

(d) Stat. 44 & 45 Vict. c. 41.

text of this important statute, for which the reader is referred to the editor's "Conveyancing Statutes." In the notes and precedents contained in the same work, an attempt is made to ascertain the effect of this Act upon the previous law and practice, and to explain and illustrate the new practice of conveyancing, which has arisen from general reliance on the provisions of the Act.

APPENDIX (A).

Referred to, p. 127.

THE case of *Muggleton v. Barnett* was shortly as follows (a):—Edward Muggleton purchased in 1772 certain copyhold property, held of a manor in which the custom was proved to be, that the land descended to the youngest son of the person last seised, if he had more than one; and if no son, to the daughters as parceners; and if no issue, then *to the youngest brother of the person last seised, and to the youngest son of such youngest brother.* There was, however, no formal record upon the rolls of the Court of the custom of the manor with respect to descents, but the custom was proved by numerous entries of admission. The purchaser died intestate in 1812, leaving two granddaughters, the only children of his only son, who died in his lifetime. One of the granddaughters died intestate and unmarried, and the other died leaving an only son, who died in 1854 without issue, and apparently intestate, and who was the person last seised. On his death the youngest son of the youngest brother of the purchaser brought an ejectment, and the Court of Exchequer, by two against one, decided against him. On appeal, this decision was confirmed by the Court of Exchequer Chamber, by four judges against three. But much as the judges differed amongst themselves as to the extent of the custom amongst collaterals, they appear to have all agreed that the act to amend the law of inheritance had nothing to do with the matter. The act, however, expressly extends to lands descendible according to the custom of borough English or any other custom; and it enacts that

(a) The substance of these observations appeared in letters to the editor of the "Jurist"

newspaper, 4 Jur., N. S., Part 2, pp. 5, 56.

in every case descent shall be traced from the purchaser. Under the old law, seisin made the stock of descent. By the new law, the purchaser is substituted *in every case* for the person last seised. The legislature itself has placed this interpretation upon the above enactment. A well known statute, commonly called the Wills Act (*b*), enacts, "that it shall be lawful for every person to devise or dispose of by his will, executed in manner hereinafter required, all real estate which he shall be entitled to, either at law or in equity, at the time of his death, *and which, if not so devised or disposed of, would devolve upon the heir at law or customary heir of him, or, if he became entitled by descent, of his ancestor.*" Now the old doctrine of *possessio fratris* was this,—that if a purchaser died seised, leaving a son and daughter by his first wife, and a son by his second wife, and the eldest son entered as heir to his father, the possession of the son made his sister of the whole blood to inherit as his heir, in exclusion of his brother of the half-blood; but if the eldest son did not enter, his brother of the half-blood was entitled *as heir to his father, the purchaser*. This doctrine was abolished by the statute. Descent in every case is to be traced from the purchaser. Let the eldest son enter, and remain ever so long in possession, his brother of the half-blood will now be entitled, on his decease, in preference to his sister of the whole blood, not as his heir, but *as heir to his father* (*c*).

Let us now take the converse case of a descent according to the custom of borough English, and let the purchaser die intestate, leaving a son by his first wife, and a son and daughter by his second wife. Here it is evident that the youngest son has a right to enter as customary heir. He enters accordingly, and dies intestate, and without issue. Who is the next heir since the statute? Clearly the brother of the half-blood; for he is the *customary heir of the purchaser*. As the common law, which is the general custom

(*b*) Stat. 7 Will. IV. & 1 Vict.
c. 26, s. 3, ante, p. 246.

(*c*) See Sugden's Real Property
Statutes, pp. 280, 281 (1st ed.);
267, 268 (2nd ed.).

of the realm, was altered by the statute, and a person became entitled to inherit who before had no right, so the custom of borough English, and every other special custom, being expressly comprised in the statute, is in the same manner altered; and the stock of descent, which was formerly the person last seised, is now, in every case, the purchaser and the purchaser only.

Suppose, therefore, that Edward Muggleton, the purchaser, who died in 1812, had left a son by his first wife, and a son and daughter by his second wife, and that the youngest son, having entered as customary heir, died intestate in 1854,—who would be entitled? Clearly, the elder son, as customary heir, being of the male sex, in preference to the daughter. Before the act the sister of the whole blood would have inherited, as customary heir to her younger brother, and the elder brother, being of the half-blood to the person last seised, could not have inherited at all; but since the act the descent is traced from the purchaser; and the elder brother would, accordingly, be entitled, not as heir to his half-brother, but as heir to his father. The act then breaks in upon the custom. By the custom before the act the land descended to the sister of the person last seised, in default of brothers of the whole blood. By the act the purchaser is substituted for the person last seised, and whoever would be entitled as heir to the purchaser, if he had just died seised, must now be entitled as his heir, however long ago his decease may have taken place.

Let us put another case: Suppose the father of Edward Muggleton, the purchaser, had been living in 1854, when his issue failed. It is clear, that under the act the father would have been entitled to inherit, notwithstanding the custom. Here, again, the custom would have been broken in upon by the act, and a person would have been entitled to inherit who before was not.

Suppose, again, that the father of Edward Muggleton had been the purchaser, and that Edward Muggleton was

his youngest son, and that the estate, instead of being a fee simple, had been an estate tail. Estates tail, it is well known, follow customary modes of descent in the same manner as estates in fee. The purchaser, however, or donee in tail, is and was, both under the new law and under the old, the stock of descent. The Courts appear to have been satisfied that in lineal descents according to the custom the youngest was invariably preferred. It is clear, therefore, that, when the issue of Edward Muggleton failed in 1854, the land would have descended to the plaintiff as youngest son of the next youngest son of the purchaser, although the plaintiff was but the first cousin twice removed of the person last seised.

The change, however, which the act has accomplished is simply to assimilate the descent of estates in fee to that of estates tail. The purchaser is made the stock in lieu of the person last seised. It is evident, therefore, that upon the supposition last put, of the father of Edward Muggleton being the purchaser, although the estate was an estate in fee, the plaintiff would have been entitled as customary heir.

step from this case to that which actually occurred is very easy. On failure of the issue of the purchaser (whether after his decease or in his lifetime it matters not), the heir to be sought is the heir of the purchaser, and not the heir of the person last seised; and if the descent be governed by any special custom, then the customary heir of the purchaser must be sought for. Who, then, was the customary heir of Edward Muggleton, the purchaser? The case in *Muggleton v. Barnett* expressly states, that the land descends, if no issue, to the youngest son of the youngest brother of the person last seised, that is, of the stock of descent. There is no magic in the phrase "last seised." These words were evidently used in the statement of the custom as they would have been used before the act in a statement of the common law. It would have been said that the land descends, for want of issue, to the eldest son of the eldest brother of the person last seised. It would

have been taken for granted that everybody knew that seisin made the stock. The law, however, is now altered in this respect. The purchaser only is the stock. If Edward Muggleton had died without leaving issue, the plaintiff clearly would have been entitled. His issue fails after his decease; but so long as *he* is the stock, the same person under the same custom must of necessity be his heir.

It was expressly stated in the case, that there was no formal record with respect to descents. This is important, as showing that the person last seised was mentioned in the statement of the custom simply in accordance with the ordinary rule of law, that the person last seised was the stock of descent prior to the act. If, however, there had been such a formal record, still Edward Muggleton, the purchaser, died seised. If he had not died seised, it might be said, according to the strict construction placed upon the records of customary descent, that the custom did not apply, and that his heir according to the common law was entitled (*d*). But in the present case the custom is expressly stated to be gathered from admissions only; and so long as the person last seised was by law the stock of descent, it is evident that a statement of the custom, as applying to the person last seised, was merely a statement with reference to the stock of descent as then existing. The act alters the stock of descent, and so far alters the custom. It substitutes the purchaser for the person last seised, whatever may be the custom as to descents. It follows, therefore, that the plaintiff in *Muggleton v. Barnett*, being the customary heir of the purchaser, was entitled to recover.

Since these observations were written, the following remarks have been made by Lord St. Leonards on the case of *Muggleton v. Barnett*:—"In the result, the Exchequer and Exchequer Chamber, with much diversity of opinion as to the extent of the custom, decided the case against the claimant, who claimed as heir by the custom to the

(*d*) *Payne v. Barker*, O. Bridg. 18; *Rider v. Wood*, 1 K. & J. 644.

last purchaser, which he was; because he was not heir by the custom to the *person last seised*. And yet the act extends to all customary tenures, and alters the descent in all such cases as well as in descents by the common law, by substituting the last purchaser as the stock from whom the descent is to be traced for the person last seised. The Court, perhaps, hardly explained the grounds upon which they held the statute not to apply to this case" (*e*).

(*e*) Lord St. Leonards' Essay on the Real Property Statutes, p. 271 (2nd ed.).

APPENDIX (B).

Referred to, p. 138.

THE point in question is as follows (a):—Suppose a man to be the purchaser of freehold land, and to die seised of it intestate, leaving two daughters, say Susannah and Catherine, but no sons. It is clear that the land will then descend to the two daughters, Susannah and Catherine, in equal shares as coparceners. Let us now suppose that the daughter Catherine dies on or after the 1st of January, 1834, intestate, and without having disposed of her moiety in her lifetime, leaving issue one son. Under these circumstances the question arises, to whom shall the inheritance descend? The act to amend the law of inheritance enacts, “that in every case descent shall be traced from the purchaser.” In this case Catherine is clearly not the purchaser, but her father; and the descent of Catherine’s moiety is accordingly to be traced from him. Who, then, as to this moiety, is his heir? Supposing that, instead of the moiety in question, some other land were, after Catherine’s decease, to be given to the heir of her father, such heir would clearly be Susannah, the surviving daughter, as to one moiety of the land, and the son of Catherine as to the other moiety. It has been argued, then, that the moiety which belonged to Catherine, by descent from her father, must, on her

(a) The substance of the following observations appeared in the “Jurist” newspaper for February 28, 1846. The point has since been expressly decided, in accordance with the opinion for which the author has contended, in *Cooper v. France*, V.-C. E., 14 Jur. 214; S. C., 19 L. J., N. S.,

Ch. 313, the authority of which decision is recognized by Lord St. Leonards in his *Essay on the Real Property Statutes*, p. 282 (1st ed.), 269 (2nd ed.), and in *Lewin v. Lewin*, C. P., 21 Nov. 1874, stated in *Williams on Seisin*, pp. 81—84.

decease, descend to the heir of her father, in the same manner as other land would have done had she been dead in her father's lifetime; that is to say, that one moiety of Catherine's moiety will descend to her surviving sister Susannah, and the other moiety of Catherine's moiety will descend to her son. But the following reasoning seems to show that, on the decease of Catherine, her moiety will not descend equally between her surviving sister and her own son, but will descend entirely to her son.

In order to arrive at our conclusion, it will be necessary to inquire, first, into the course of descent of an estate tail, under the circumstances above described, according to the old law; secondly, into the course of descent of an estate in fee simple, according to the old law, supposing the circumstances as above described, with this qualification, that neither Susannah nor Catherine shall be considered to have obtained any actual seisin of the lands. And, when these two points shall have been satisfactorily ascertained, we shall then be in a better position to place a correct interpretation on the act by which the old law of inheritance has been endeavoured to be amended.

1. First, then, as to the course of descent of an estate tail according to the old law. Let us suppose lands to have been given to the purchaser and the heirs of his body. On his decease, his two daughters, Susannah and Catherine, are clearly the heirs of his body, and as such will accordingly have become tenants in tail each of a moiety. Now there is no proposition more frequently asserted in the old books than this: that the descent of an estate tail is *per formam doni* to the heirs of the body of the donee. On the decease of one heir of the body, the estate descends not to the heir of such heir, but to the heir of the body of the original donee *per formam doni*. Suppose, then, that Catherine should die, her moiety would clearly have descended, by the old law, to the heir of the body of her father, the original donee in tail. Whom, then, under the above circumstances, did the old law consider to be the heir of his body quoad this moiety? The Tenures of Littleton,

as explained by Lord Coke's Commentary, supply us with an answer. Littleton says, "Also, if lands or tenements be given to a man in tail who hath as much land in fee simple, and hath issue two daughters, and dies, and his two daughters make partition between them, so as the land in fee simple is allotted to the younger daughter, in allowance for the land and tenements in tail allotted to the elder daughter; if, after such partition made, the younger daughter alieneth her land in fee simple to another in fee, and hath issue a son or daughter, and dies, the issue may enter into the lands in tail, and hold and occupy them in purparty with her aunt" (b). On this case Lord Coke makes the following comment:—"The eldest coparcener hath, by the partition, and the matter subsequent, barred herself of her right in the fee-simple lands, insomuch as when the youngest sister alieneth the fee-simple lands and dieth, and her issue entereth into *half the lands* entailed, yet shall not the eldest sister enter into *half of the lands* in fee simple upon the alienee" (c). It is evident, therefore, that Lord Coke, though well acquainted with the rule that an estate tail should descend *per formam doni*, yet never for a moment supposed that on the decease of the younger daughter, her moiety would descend half to her sister, and half to her issue; for he presumes, of course, that the issue would enter into *half the lands entailed*, that is, into the whole of the moiety of the lands which had originally belonged to their mother. After the decease of the younger sister, the heirs of the body of her father were no doubt the elder sister and the issue of the younger; but, *as to the moiety which had belonged to the younger sister*, this *as* clearly was not the case; the heir of the body of the father *to inherit this moiety* was exclusively the issue of such younger daughter, who were entitled to the whole of it in the place of their parent. This incidental allusion of Lord Coke is as strong, if not stronger, than a direct assertion by him of the doctrine: for it seems to show that a doubt on the subject never entered into his mind.

(b) Litt. sect. 260.

(c) Co. Litt. 172 b.

At the end of the section of Littleton, to which we have referred, it is stated that the contrary is holden, M., 10 Hen. VI.; *scil.* that the heir may not enter upon the parcener who hath the entailed land, but is put to a formedon. On this Lord Coke remarks (*d*), that it is no part of Littleton and is contrary to law; and that the case is not truly vouched, for it is not in 10 Hen. VI., but in 20 Hen. VI., and yet there is but the opinion of Newton, obiter, by the way. On referring to the case in the Year Books, it appears that Yelverton contended, that if the sister, who had the fee simple, aliened, and had issue, and died, the issue would be barred from the land entailed by the partition, which would be a mischief. To this Newton replied, "No, sir; but he shall have formedon, and shall recover *the half*" (*e*). Newton, therefore, though wrong in supposing that a formedon was necessary, thought equally with Lord Coke, that a *moiety* of the land was the share to be recovered. This appears to be the Newton whom Littleton calls (*f*) "my master, Sir Richard Newton, late Chief Justice of the Common Pleas."

is another section in Littleton, which, though not conclusive, yet strongly tends in the same direction; namely, section 255, where it is said, that, if the tenements whereof two parceners make partition "be to them in fee tail, and the part of the one is better in yearly value than the part of the other, albeit they be concluded during their lives to defeat the partition, yet, if the parcener who hath the lesser part in value hath issue and die, the issue may disagree to the partition, and enter and *occupy in common* the other part which was allotted to her aunt, and so the other may enter *and occupy in common* the other part allotted to her sister, &c., as if no partition had been made." Had the law been that, on the decease of one sister, her issue were entitled only to an undivided fourth part, it seems strange that Littleton should not have stated that they might enter

(*d*) Co. Litt. 173 a.

(*f*) Sect. 729.

(*e*) Year Book, 20 Hen. VI. 14 a.

into a fourth only, and that the other sister might occupy the remaining three-fourths.

In addition to these authorities, there is a modern case, which, when attentively considered, is an authority on the same side; namely, *Doe d. Gregory and Geere v. Whichelo* (g). This case, so far as it relates to the point in question, was as follows:—Richard Lemmon was tenant in tail of certain premises, and died, leaving issue by his first wife one son, Richard, and a daughter, Martha; and by his second wife three daughters, Anne, Elizabeth, and Grace. Richard Lemmon, the son, as heir of the body of his father, was clearly tenant in tail of the whole premises during his life. He died, however, without issue, leaving his sister Martha of the whole blood, and his three sisters of the half blood, him surviving. Martha then intermarried with John Whichelo, and afterwards died, leaving John Whichelo, the defendant, her eldest son and heir of her body. John Whichelo, the defendant, then entered into the whole of the premises, under the impression that as he was heir to Richard Lemmon, the son, he was entitled to the whole. In this, however, he was clearly mistaken; for the descent of an estate tail is, as we have said, traced from the purchaser, or first donee in tail, *per formam doni*. The heirs of the purchaser, Richard Lemmon, the father, were clearly his four daughters, or their issue; for the daughters by the second wife, though of the half blood to their brother by the former wife, were, equally with their half sister Martha, of the whole blood to their common father. The only question then is, in what shares the daughters or their issue became entitled. At the time of the ejectment all the daughters were dead. Elizabeth was dead, without issue; whereupon her one equal fourth part devolved, without dispute, on her three sisters, Martha, Anne, and Grace: each of these, therefore, became entitled to one equal third part. Martha, as we have seen, died, leaving John Whichelo, the defendant, her eldest son and heir of her body. Anne died, leaving James Gregory, one of the lessors of the plaintiff, her grand-

son and heir of her body; and Grace died, leaving Diones Geere, the other lessor of the plaintiff, her only son and heir of her body. Under these circumstances, an action of ejectment was brought by James Gregory and Diones Geere; and on a case reserved for the opinion of the Court, a verdict was directed to be entered for the plaintiff *for two-thirds*. Neither the counsel engaged in the cause, nor the Court, seem for a moment to have imagined that James Gregory and Diones Geere could have been entitled to any other shares. It is evident, therefore, that the Court supposed that, on the decease of Martha, the heir of the body of the purchaser, *as to her share*, was her son, John Whichelo, the defendant; that on the decease of Anne, the heir of the body of the purchaser, *as to her share*, was James Gregory, her grandson; and that, on the decease of Grace, the heir of the body of the purchaser, *as to her share*, was her son, Diones Geere. On no other supposition can the judgment be accounted for, which awarded one-third of the whole to the defendant, John Whichelo, one other third to James Gregory, and the remaining third to Diones Geere. For let us suppose that, on the decease of each coparcener, her one-third was divided equally amongst the then existing heirs of the body of the purchaser; and the result will be, that the parties, instead of each being entitled to one-third, would have been entitled in fractional shares of a most complicated kind; unless we presume, which is next to impossible, that all the three daughters died at one and the same moment. It is not stated, in the report of the case, in what order the decease of the daughters took place; but according to the principle suggested, it will appear, on working out the fractions, that the heir of the one who died first would have been entitled to the largest share, and the heir of the one who died last would have been entitled to the smallest. Thus, let us suppose that Martha died first, then Anne, and then Grace. On the decease of Martha, according to the principle suggested, her son, John Whichelo, would have taken only one-third of her share, or one-ninth of the whole, and Anne and Grace, the surviving sisters, would each also have taken one-third of the share of Martha, in addition to their own

one-third of the whole. The shares would then have stood thus: John Whichelo $\frac{1}{3}$, Anne $\frac{1}{3} + \frac{1}{3}$, Grace $\frac{1}{3} + \frac{1}{3}$. Anne now dies. Her share, according to the same principle, would be equally divisible amongst her own issue, James Gregory, and the heirs of the body of the purchaser, namely, John Whichelo and Grace. The shares would then stand thus: John Whichelo $\frac{1}{3} + \frac{1}{3} (\frac{1}{3} + \frac{1}{3})$; namely, his own share and one-third of Anne's share = $\frac{2}{3}$: James Gregory, $\frac{1}{3} (\frac{1}{3} + \frac{1}{3}) = \frac{1}{3}$: Grace, $\frac{1}{3} + \frac{1}{3} + \frac{1}{3} (\frac{1}{3} + \frac{1}{3})$; namely, her own share and one-third of Anne's share, = $\frac{2}{3}$. Lastly, Grace dies, and her share, according to the same principle, would be equally divisible between her own issue, Diones Geere, and John Whichelo and James Gregory, the other co-heirs of the body of the purchaser. The shares would then have stood thus: John Whichelo, $\frac{2}{3} + (\frac{1}{3} \times \frac{1}{3})$; namely, his own share and one-third of Grace's share, = $\frac{7}{9}$ of the entirety of the land: James Gregory, $\frac{1}{3} + (\frac{1}{3} \times \frac{1}{3})$; namely, his own share and one-third of Grace's share, = $\frac{4}{9}$: Diones Geere, $\frac{1}{3} \times \frac{1}{3} = \frac{1}{9}$. On the principle, therefore, of the descent of the share of each coparcener amongst the co-heirs of the body of the purchaser for the time being, the heir of the body of the one who died first would have been entitled to thirty-seven eighty-first parts of the whole premises; the heir of the body of the one who died next would have been entitled to twenty-eight eighty-first parts; and the heir of the body of the one who died last would have been entitled only to sixteen eighty-first parts. By the judgment of the Court, however, the lessors of the plaintiff were entitled each to one equal third part; thus showing that, although the descent of an estate tail under the old law was always traced from the purchaser (otherwise John Whichelo would have been entitled to the whole), yet this rule was qualified by another of equal force, namely, that all the lineal descendants of any person deceased should represent their ancestors; that is, should stand in the same place, and take the same share, as the ancestor would have done if living.

2. Let us now inquire into the course of descent of an estate in fee simple, according to the old law, in case the

purchaser should have died, leaving two daughters, Susanah and Catherine, neither of whom should have obtained any actual seisin of the lands, and that one of them (say Catherine) should afterwards have died, leaving issue one son. In this case, it is admitted on all sides, that the share of Catherine would have descended to the heir of the purchaser, and not to her own heir, in the character of heir to her; for the maxim was *seisina facit stipitem*. Had either of the daughters obtained actual seisin, her seisin would have been in law the actual seisin of the sister also; and on the decease of either of them her share would have descended, not to the heir of her father, but to her own heir, the seisin acquired having made her the stock of descent. In such a case, therefore, the title of the son of Catherine to the whole of his mother's moiety would have been indisputable; for, while he was living no one else could possibly have been her heir. The supposition, however, on which we are now to proceed is, that neither of the daughters ever obtained any actual seisin; and the question to be solved is, to whom, on the death of Catherine, did her share descend; whether equally between her sister and her son, as being together heir to the purchaser, or whether solely to the son, as being heir to the purchaser quoad his mother's share. In the late Mr. Sweet's valuable edition of Messrs. Jarman and Bythewood's Conveyancing (*h*), it is stated to be "apprehended that the share of the deceased sister would have descended in the same manner as by the recent statute it will now descend in every instance," which manner of descent is explained to be one-half of the share, or a quarter of the whole only, to the son, and the remaining half of the share to the surviving sister, thus giving her three-quarters of the whole. This doctrine, however, the writer submits, is erroneous; and in proof of such error it might be sufficient simply to call to mind the fact that the law of England had but one rule for the discovery of the heir. The heirs of a purchaser were, first the heirs of his

(*h*) Vol. i. p. 139. This point has, however, since been decided in accordance with the author's opinion in *Paterson v. Mills*, V.-C. K. Bruce, 15 Jur. 1; S. C., 19 L. J., N. S., Ch. 310.

body, and then his collateral heirs; and an estate tail was merely an estate restricted in its descent to lineal heirs. If, therefore, the heir of a person had been discovered for the purpose of the descent of an estate tail, it is obvious that the same individual would also be heir of the same person for the purpose of the descent of an estate in fee simple. No distinction between the two is ever mentioned by Lord Coke, or any of the old authorities. Now, we have seen that the heir of the purchaser, under the circumstances above mentioned, for the purpose of inheriting an estate tail, was the son of the deceased daughter solely, *quoad the share which such daughter had held*; and it would accordingly appear that the heir of the purchaser, to inherit an estate in fee simple, was also the son of the deceased daughter *quoad her share*. That this was in fact the case appears incidentally from a passage in the Year Book (i), where it is stated, that "If there be two coparceners of a reversion, and their tenant for term of life commits waste, and then one of the parceners has issue and dies, and the tenant for term of life commits another waste, and the aunt and niece bring a writ of waste jointly, for they cannot sever, and the writ of waste is general, still their recovery shall be special; for the aunt shall recover treble damages for the waste done, as well in the life of her parcener as afterwards, and the niece shall only recover damages for the waste done after the death of her mother, and the place wasted they shall recover jointly. And the same law is, if a man has issue two daughters and dies seised of certain land, and a stranger abates, and afterwards one of the daughters has issue two daughters and dies, and the aunt and the two daughters bring assize of mort d'ancestor; here, if the aunt recover the *moiety* of the land and damages from the death of the ancestor, and the nieces recover *each one of them the moiety of the moiety* of the land, and damages from the death of their mother, still the writ is general." Here we have all the circumstances required; the father dies seised, leaving two daughters, neither of whom obtains any actual seisin of the land; for

(i) 35 Hen. VI. 23.

a stranger abates,—that is, gets possession before them. One of the daughters then dies, without having had possession, and her share devolves entirely on her issue, not as heirs to her, for she never was seised, but as heirs to her father quoad her share. The surviving sister is entitled only to her original moiety, and the two daughters of her deceased sister take their mother's moiety equally between them.

There is another incidental reference to the same subject in Lord Coke's Commentary upon Littleton (*k*): "If a man hath issue two daughters, and is disseised, and the daughters have issue and die, the issues shall join in a præcipe, because one right descends from the ancestor, and *it maketh no difference* whether the common ancestor, being out of possession, *died before the daughters or after*, for that, in both cases, they must make themselves heirs to the grandfather which was last seised, and when the issues have recovered, they are coparceners, and one præcipe shall lie against them." "It maketh no difference," says Lord Coke, "whether the common ancestor, being out of possession, died before the daughters or after." Lord Coke is certainly not here speaking of the shares which the issue would take; but had any difference in the quantity of their shares been made by the circumstance of the daughters surviving their father, it seems strange that so accurate a writer as Lord Coke should not "herein" have "noted a diversity." The descent is traced to the issue of the daughters not from the daughters, but from their father, the common grandfather of the issue. On the decease of one daughter therefore, on the theory against which we are contending, the right to her share should have devolved, one-half on her own issue and the other half on her surviving sister; and, on the decease of such surviving sister, her three-quarters should, by the same rule, have been divided, one-half to her own issue, and the other half to the issue of her deceased sister; whereas it is admitted, that had the daughters both died in their father's lifetime, their issue would have inhe-

(*k*) Co. Litt. 164 a.

rited in equal shares. Lord Coke, however, remarks no difference whether the father died before or after his daughters. Surely, then, he never could have imagined that so great an equality in the shares could have been produced by so mere an accident. It should be remembered that the rule of representation for which we are contending is the rule suggested by natural justice, and might well have been passed over without express notice; but had the opposite rule prevailed, the inequality and injustice of its operation could scarcely have failed to elicit some remark. This circumstance may, perhaps, tend to explain the fact that the writer has been unable, after a lengthened search, to find any authority expressly directed to the point; and yet, when we consider that in ancient times, the title by descent was the most usual one (testamentary alienation not having been permitted), we cannot doubt but that the point in question must very frequently have occurred. In what manner, then, can we account for the silence of our ancient writers on this subject, but on the supposition, which is confirmed by every incidental notice, that, in tracing descent from a purchaser, the issue of a deceased daughter took the entire share of their parent, whether such daughter should have died in the lifetime of the purchaser or after his decease?

Having now ascertained the course of descent among coparceners under the old law, whenever descent was traced from a purchaser, we are in a better situation to place a construction on that clause of the Act to amend the law of inheritance which enacts, "that in every case descent shall be traced from the purchaser" (1). What was the nature of the alteration which this Act was intended to effect? Was it intended to introduce a course of descent amongst coparceners hitherto unknown to the law, and tending to the most intricate and absurd subdivision of their shares? or did the Act intend merely to say that a descent from the purchaser, which had hitherto occurred only in the case of an estate tail, and in the case where the heir to a fee

(1) Stat. 3 & 4 Will. IV. c. 106, s. 2.

simple died without obtaining actual seisin, should now apply to every case? In other words, has the Act abolished the rule that, in tracing the descent from the purchaser, the issue of deceased heirs shall stand quoad their entire shares in the place of their parents? We have seen that previously to the Act, the rule that descent should be traced from the purchaser, whenever it applied, was guided and governed by another rule, that the issue of every deceased person should, quoad the entire share of such person, stand in his or her place. Why, then, should not the same rule of representation govern descent, now that the rule tracing descent from the purchaser has become applicable to every case? Had any modification been intended to be made of so important a rule for tracing descent from a purchaser, as the rule that the issue, and the issue alone, represent their ancestor, surely the Act would not have been silent on the subject. A rule of law clearly continues in force until it be repealed. No repeal has taken place of the rule that, in tracing descent from a purchaser, the issue shall always stand in the place of their ancestor. It is submitted, therefore, that this rule is now in full operation; and that, although in every case descent is now traced from the purchaser, yet the tracing of such descent is still governed by the rules to which the tracing of descent from purchasers was in former times invariably subject. If this be so, it is clear, then, that, under the circumstances stated at the commencement of this paper, the share of Catherine will descend entirely to her own issue, as heir to the purchaser quoad her share, and will not be divided between such issue and the surviving

It is said, indeed, that, by giving to the issue one-half of the share which belonged to their mother, the rule is satisfied which requires that the issue of a person deceased shall, in all cases, represent their ancestor; for it is argued that the issue still take one-fourth by representation, notwithstanding that the other fourth goes to the surviving sister, who constitutes, together with such issue, one heir to their common ancestor. This, however, is a fallacy; the rule is, "that the lineal descendants in infinitum of any person

deceased shall represent their ancestor, that is, shall stand in the same place as the person himself would have done had he been living" (*m*). Now, in what place would the deceased daughter have stood had she been living? Would she have been heir to one-fourth only, or would she not rather have been heir to the entire moiety? Clearly to the entire moiety, for had she been living, no descent of her moiety would have taken place; if, then, her issue are to stand in the place which she would have occupied if living, they cannot so represent her unless they take the whole of her share.

But it is said, again, that the surviving daughter may have aliened her share; and how can the descent of her deceased sister's share be said to be traced from the purchaser, if the survivor, who constitutes a part of the purchaser's heir, is to take nothing? The descent of the whole, it is argued, cannot be considered as traced over again on the decease of any daughter, because the other daughter's moiety may, by that time, have got into the hands of a perfect stranger. The proper reply to this objection seems to be, that the laws of descent were prior in date to the liberty of alienation. In ancient times, when the rules of descent were settled, the objection could scarcely have occurred. Estates tail were kept from alienation by virtue of the statute *De Donis* for about 200 years subsequent to its passing. Rights of entry and action were also inalienable for a very much longer period. Reversions expectant on estates of freehold, in the descent of which the same rule of tracing from the purchaser occurred, could alone have afforded an instance of alienation by the heir; and the sale of reversions appears to have been by no means frequent in early times. In addition to other reasons, the attornment then required from the particular tenant on every alienation of a reversion operated as a check on such transactions. It may, therefore, be safely asserted as a general proposition, that on the decease of any coparcener, the descent of whose share was to be traced from the purchaser, the shares of the other coparceners

had not been aliened ; and to have given them any part of their deceased sister's share, to the prejudice of her own issue, would have been obviously unfair, and contrary to the natural meaning of the rule, that " every daughter hath a several stock or root " (*n*). If, as we have seen, the rule remained the same with regard to estates tail, notwithstanding the introduction of the right of alienation (*o*), surely it ought still to continue unimpaired, now that it has become applicable to estates in fee, which enjoy a still more perfect liberty. Rules of law which have their foundation in natural justice, should ever be upheld, notwithstanding they may have become applicable to cases not specifically contemplated at the time of their creation.

(*n*) Co. Litt. 164 b.

(*o*) *Doe v. Whichelo*, 8 T. R. 211 ; ante, p. 595.

APPENDIX (C).

Referred to, note (g) to p. 146.

It has been remarked that the author differs from the view of the Court of Exchequer Chamber in the case of *Lord Dunraven v. Llewellyn* (a), without stating his reason (b). In that case the Court held that there was no general common law right of tenants of a manor to common on the waste; but the author remarked that, in his humble opinion, the authorities cited by the Court tend to the opposite conclusion (c). The judgment of the Court is as follows:—

“ The question in this case is, whether my brother Platt
 “ was right in rejecting evidence of reputation, offered on
 “ the trial before him, to show the title of the lord of the
 “ manor of Ogmores to certain lands within the ambit of the
 “ manor. The judgment.

“ The evidence was that there were very many lands and
 “ tenements held of the manor, the tenants whereof, in
 “ respect of those lands, had always exercised rights of
 “ common for all their commonable cattle on a certain waste
 “ adjoining to which was the *locus in quo*; and that the
 “ deceased persons, being such tenants and exercising
 “ rights *ante litem motam*, declared that the *locus in quo*
 “ was parcel of the waste. Another description of evidence
 “ was, that certain deceased residents in the manor had
 “ made similar declarations. No evidence was given of the

(a) 15 Q. B. 791.

(b) Six Essays on Commons Preservation, Essay 3, by Mr. F. O. Crump, p. 188.

(c) Ante, note (g) to p. 146. The reader is now referred to the cases of *Smith v. Earl Brownlow*, L. R.,

9 Eq. 241, and *Warrick v. Queen's College*, L. R., 10 Eq. 105, 123 affirmed, L. R., 6 Ch. Ap. 716 *Betts v. Thompson*, L. R., 6 Cl. Ap. 732; *Hall v. Byron*, 4 Ch. 1 667.

“ exercise of the rights of those tenants over the *locus in*
 “ *quo*. My brother Platt rejected the evidence, and, we
 “ think, rightly.

“ In the course of the argument we intimated our opinion
 “ that the want of evidence of acts of enjoyment of the
 “ rights did not affect the admissibility of the evidence, but
 “ only its value when admitted. We also stated that no ob-
 “ jection could be made to the evidence on the ground that
 “ it proceeded from persons who had not competent know-
 “ ledge upon the subject, or from persons who were them-
 “ selves interested in the question. The main inquiry was
 “ whether this was a subject of a sufficiently public nature
 “ to justify the reception of hearsay evidence relating to it.

“ If this question had been one in which all the inhabit-
 “ ants of the manor, or all the tenants of it, or a particular
 “ district of it, had been interested, reputation from any
 “ deceased inhabitant or tenant, or even deceased residents
 “ in the manor, would have been admissible, such residents
 “ having presumably a knowledge of such local customs;
 “ and if there had been a common law right for every tenant
 “ of the manor to have common on the wastes of it, reputa-
 “ tion from any deceased tenant as to the extent of those
 “ wastes, and therefore as to any particular land being waste
 “ of the manor, would have been admissible. But although
 “ there are some books which state that common appendant
 “ is of common right, and that common appendant is the
 “ common law right of every free tenant in the lord's wastes;
 “ for example, note (l) to *Mellor v. Spateman* (d); *Bennett*
 “ *v. Reeve* (e); Com. Dig. Common (B), it is not to be un-
 “ derstood that every tenant of a manor has by common law
 “ such a right, but only that certain tenants have such a
 “ right, not by prescription, but as a right by common law,
 “ incident to the grant.

“ This is explained in Lord Coke's Commentaries on the
 “ Statute of Merton (f), 2 Inst. 85. He says, ‘By this

(d) 1 Wms. Saund. 346 d (6th
 edit.).

(e) Willes, 227, 231.

(f) Stat. 20 Hen. III. c. 4.

“ ‘ recital ’ (of that statute) ‘ a point of the ancient common
 “ ‘ law appeareth, that when a lord of a manor (whereon
 “ ‘ was great waste grounds) did enfeof others of some
 “ ‘ parcels of arable land, the feoffees *ad manutenend’ ser-*
 “ ‘ *vitium socæ* should have common in the said wastes of
 “ ‘ the lord for two causes. 1. As incident to the feoff-
 “ ‘ ment, for the feoffee could not plough and manure his
 “ ‘ ground without beasts, and they could not be sustained
 “ ‘ without pasture, and by consequence the tenant should
 “ ‘ have common in the wastes of the lord for his beasts
 “ ‘ which do plough and manure his tenancy as appendant
 “ ‘ to his tenancy, and this was the beginning of common
 “ ‘ appendant. The second reason was, for maintenance
 “ ‘ and advancement of agriculture and tillage, which was
 “ ‘ much favoured in law.’ The same law is laid down by
 “ Coke and Foster, 1 Roll. Abr. 396, l. 45, tit. Common /
 “ (C), pl. 4.

“ This right, therefore, is not a common right of all,
 “ tenants, but belongs only to each grantee, before the
 “ statute of *Quia Emptores*, of arable land by virtue of
 “ his individual grant, and as an incident thereto; and it
 “ is as much a peculiar right of the grantee as one derived
 “ by express grant or by prescription, though it differs in
 “ its extent, being limited to such cattle as are kept for
 “ ploughing and manuring the arable land granted, and as
 “ are of a description fit for that purpose; whereas the
 “ right by grant or prescription has no such limits, and
 “ depends on the will of the grantor.

“ We are therefore of opinion that this case is precisely
 “ in the same situation as if evidence had been offered that
 “ there were many persons, tenants of the manor, who had
 “ separate prescriptive rights over the lord’s wastes; and
 “ reputation is not admissible in the case of such separate
 “ rights, each being private, and depending on each sepa-
 “ rate prescription, unless the proposition can be supported
 “ that, because there are many such rights, the rights have
 “ a public character, and the evidence, therefore, becomes
 “ admissible.

“ We think this position cannot be maintained. It is impossible to say in such a case where the dividing point is. What is the number of rights which is to cause their nature to be changed, and to give them a public character ?

“ But it is said that there are cases which have decided that where there are numerous private prescriptive rights reputation is admissible ; and the case of *Weeks v. Sparke* (g) is relied upon as establishing that proposition. The reasons given by the different judges in that case would certainly not be satisfactory at this day ; some putting it on the ground of the custom of the circuits, some upon the ground that where there was proof of the enjoyment of the right, reputation was admissible. Both these reasons are now held to be insufficient. It may be that the evidence admitted was that of reputation from deceased commoners, which would be admissible on the same principle that the statement of a deceased person in possession of land abridging or limiting his interest is admissible ; but that reason does not apply to the present case, because the statements are used to extend, not to limit the rights. It was also said that the case of *Weeks v. Sparke* (g) had since been sanctioned by the Court of Queen’s Bench in that of *Pritchard v. Powell* (h), where it was held that reputation was admissible to prove common between two wastes *pur cause de vicinage*. But the claim in that case was treated as a matter of immemorial custom (see p. 603) ; and reputation in support of a custom is admissible.

“ We are of opinion, therefore, that the evidence of reputation offered in this case was, according to the well established rule in the modern cases, inadmissible, as it is in reality in support of a mere private prescription ; and the number of these private rights does not make them to be of a public nature.

“ Therefore the judgment must be affirmed.”

Judgment affirmed.

(g) 1 M. & S. 679.

(h) 10 Q. B. 589.

The substance of the argument of the Court appears to be this: Common appendant is not a right of all tenants, but only of *certain* of the tenants, namely, the tenants of arable land; and being the individual right of some, and not the general right of all, it is not of so public a nature as to warrant the admission of evidence of reputation concerning it.

The substance of the argument of the Court.

The authorities cited are:—

1. Note (l) to *Mellor v. Spateman* (i). This is as follows:—"Common appendant; being the common law right of every free tenant of a manor on the lord's wastes (Com. Dig. tit. Common (B)), is confined to such and so many cattle as the tenant has occasion for, to plough and manure his land, in proportion to the quantity thereof."

Serjeant Williams's note.

2. The case of *Bennett v. Reeve* (k). It is there said—"The reason for common appendant appears to be this, that as the tenant would necessarily have occasion for cattle, not only to plough but likewise to manure his own land, he must have some place to keep such cattle in whilst the corn is growing on his own arable land, and therefore of common right (if the lord had any waste) he might put his cattle there when they could not go on his own arable land. This is a simple and intelligible reason for this custom, and is said to be the reason in Co. Litt. 122 a."

Bennett v.

3. Comyns' Digest, tit. Common (B). It is there said—"Common appendant is of common right. 1 Roll. 396, l. 44. For if a man had enfeoffed others, before the Statute of *Quia Emptores Terrarum*, of lands parcel of his manor, the feoffees should have common for their commonable cattle within the wastes, &c. of the lord, as incident to their feoffment. 2 Inst. 85, 6, per 2 J.; 1 Roll. 396, l. 45; 4 Co. 37."

Comyns' Digest

The last authority is Lord Coke's Commentary on the Statute of Merton, which is set out at length in the judgment of the Court.

(i) 1 Wms. Saund. 346 d. (6th edit.).

(k) Willes, 227, 231.

APPENDIX.

Admitted
exceptions.

It is admitted that common appendant cannot belong to any but arable land. It cannot belong to a house, as such, exclusive of any yard or place for cattle, nor can it belong to ancient meadow or pasture, nor to an ancient wood (l), nor to the bed of a river, nor, it is presumed, to the soil of a highway, nor to mines and minerals, of all which there may be tenants. All these are admitted exceptions. But the admission of an exception is not necessarily the destruction of a rule. And it is submitted that, as a rule, in the times of the Normans, all tenants were tenants of arable land, that the meadow and pasture lands were subservient to the arable, that by land was primarily meant arable land, that the exceptions depend simply on the nature of their subject-matter, and that the rights of the owners of arable land in a manor were the rights of the whole agricultural public in that manor, and, as such, of a sufficiently public nature to make reputation properly admissible in questions concerning them.

The rule.

A tenant in former times required a house to live in, arable land for his maintenance, pasture for his cattle, acorns for his pigs, and wood for fuel and repairs. Accordingly, in the argument in *Hill v. Grange* (m), it is said, "Every-
" thing is placed in writs by the rule of the register accord-
" ing to its dignity; for which reason a messuage is placed
" before land, and land before meadow, and meadow before
" pasture, *et sic de similibus*. And everything is ranked
" and distinguished in dignity according to its necessary use
" in life; for to have a house for a man to dwell in, and to
" defend his body against the coldness and inclemency of the
" air, is more necessary than to have land to plough for
" bread; and to have land for bread is again more neces-
" sary than to have meadow for hay for cattle; and to have
" meadow for hay, which will serve the whole year, is more
" necessary than pasture, *et sic de similibus*." Here it is
said that land is for bread. By "land" is meant "arable
land," according to the well-understood meaning of the

(l) See *Earl of Sefton v. Court*, 5 B. & C. 917, 922. (m) Plowd. 164, 169.

word in ancient times. And the land was for bread. Every tenant took land because he desired to live upon the corn it grew. Meadow, pasture or wood, without arable land, was of no use, and therefore not taken alone. The meadow and pasture were required to support the horses, cattle and sheep, by means of which the land was tilled and manured, and the woods in those days were chiefly valuable as affording sustenance for the pigs. *Porci inannulati*, or unrun pigs, are the objects of frequent animadversion in sundry old court rolls (*n*). In Domesday Book the meadow land is frequently measured by ploughs. Thus in Kensington (Chenesit) there was land to ten ploughs, meadow for two ploughs, pasture for the cattle of the village, and pannage for two hundred hogs (*o*). By "meadow for two ploughs" was meant so much meadow as would support the oxen necessary for two ploughs (*p*). So in the ancient Saxon grants (*q*), and also in the Norman grants made prior to the statute of *Quia Emptores* (*r*), meadows and pastures are mentioned with other appurtenances as belonging to the land (*s*). So in the *Abbreviatio Placitorum* it is recorded that in Michaelmas term, 2 John, Walter de Witifeld recovers his seisin of twenty acres of pasture and forty acres of wood *belonging to his free tenement* (*t*).

The land was for bread.

In Domesday, meadow measured by ploughs.

Meadows belonged to land.

The land was measured amongst the Saxons by hides and yard lands (*virgatæ*), of which four usually went to a hide. Thus the Saxon Chronicle, in speaking of Domesday, says, —"So very narrowly, indeed, did he commission them to trace it out, that there was not one single *hide* nor *yard land*, nay, moreover (it is shameful to tell, though he thought it no shame to do it), not even an ox, nor a cow, nor a swine was there left, that was not set down in his

Hides and yard lands,

(*n*) See those of the manor of Wimbleton.

(*o*) Bawdwen's Translation of Domesday, Middlesex, p. 25.

(*p*) Sir H. Ellis's Introduction to Domesday, vol. 1, pp. 103, 149, n. (4).

(*q*) Sharon Turner's Anglo-Saxons, vol. 2, pp. 555, 556.

(*r*) Stat. 18 Edw. I. c. 1.

(*s*) Mad. Form. Angl. No. 288, p. 178; No. 296, p. 181; No. 298, p. 182; No. 338, p. 257; No. 360, p. 274; No. 362, p. 275; No. 364, p. 276; No. 580, p. 328.

(*t*) *Abbreviatio Placitorum*, p. 27. See also Hil. 4 John, p. 37.

plowlands
and oxgangs.

Gain and
tillage
synonymous.

writ" (*u*). A hide land was supposed to be as much arable land as would maintain a family. It was accordingly called *familia* by the Venerable Bede (*x*), though in some rare cases the term "hide" appears to have been applied to pasture and wood (*y*). But amongst the Normans lands were measured by plowlands (*carucatae*) and oxgangs (*bovatae*), terms exclusively applicable to arable land, a plowland being as much as a plough could till, and an oxgang as much as an ox-team could till (*z*). A writ for an oxgang of marsh was held ill, "because an oxgang is always of a thing which lies in tillage" (*a*). Though, as Lord Coke observes (*b*), "a plowland may contain a messuage, wood, meadow, and pasture, because that by them the plowman and the cattle belonging to the plow are maintained." Gain and tillage were synonymous terms, *gaigner* signifying to till and *gainure* tillage. So beasts of the plough and

(*u*) Sax. Chro. Anno 1085, p. 289, Ingram's edit. The learned translator puts "yard of land," which he explains to be the fourth part of an acre; but the expression is *gynde lander*, yard land, which comprised several acres, varying in different places. Gibson rightly translates the passage thus: "*ut ne unica esset hyda aut virgata terræ.*" Gibson's Sax. Chron.,

(*x*) Co. Litt. 69 a; Sir H. Ellis's Introduction to Domesday, vol. 1, p. 145.

(*y*) Sir H. Ellis's Introduction to Domesday, vol. 1, p. 148.

(*z*) Ibid. vol. 1, p. 156. Lord Coke, however, says that an oxgang was as much as *an ox* could till.

(*a*) Fitz. Abr. tit. Briefs, 241. The learned editor of Co. Litt. erroneously supposes that the writ was held ill on account of the uncertainty of the term oxgang; Co. Litt. 69 a, n. (*s*). And he further

adds, "See *infra*, a like case as to the uncertainty of *virgata*." The case referred to appears to be that mentioned by Lord Coke in Co. Litt. 69 a—"A fine shall not be received *de una virgata terræ*, for the uncertainty; vide 39 Hen. VI. 8." But on reference to the Year Book it will be found that all that was decided was, that if a grant was anciently made of two virgates of land, on which two messuages have since been built, and part of which has since been converted into meadow, pasture and wood, the deed of grant must be pleaded in its terms, and the land demanded by the names appropriate to its present state of messuage, land, meadow, pasture and wood, the change being alleged. And in Sheppard's Touchstone, p. 12, *bovata* and *virgata* are both mentioned amongst the proper terms to pass land by fine.

(*b*) Co. Litt. 69 a.

cattle, which tilled and manured the land, were exempt from distress if any other could be found (c). And the ancient law with respect to tithe corresponded with this state of things. As a rule, every kind of produce was titheable. But no tithe was payable for grass used for the agistment or feeding of any cattle or sheep employed in the tillage or manurance of arable land within the parish; because the parson thereby got better tithes from the arable land (d). The pasture land was thus treated by law as subservient to the arable, and excused from tithe on the ground that it tended to make the arable land more profitable.

Distress.
Tithes.

The statutes of Merton (e) and Westminster the second (f) treat tenants entitled to common appendant as a well-known class, the former speaking of them as feoffees, the latter as tenants or the lord's men. Both statutes relate only to common of pasture, that being a right, and the only right, always given by the law; and the latter statute expressly excepts common of pasture claimed by any one in any other manner than of common right he ought to have, "*alio modo quàm de jure communi habere deberet.*" By these statutes the lord was enabled to improve his wastes, provided he left sufficient common for the tenants.

The Statutes
of Merton
and West-
minster the
second.

The tenants exercising these rights of common were often called generally the lord's freemen. Thus in the reign of King John, *Amauricus Comes Hebraicarum* grants to a tenant as to his freeman, for his service and homage, a yard land, with a messuage to the same land belonging, and with all its appurtenances, to hold of him and his heirs to the tenant and his heirs at a certain rent; "and I will," the deed proceeds, "that he shall have common in my town of M. like my other freemen (*sicut alii liberi mei homines*) in woods and waters and pastures and ways and paths" (g). So, in the second year of the reign of King John, the men of *Prunhull*, in Sussex, complain that the abbot of Battle

The lord's
freemen.

(c) Com. Dig. tit. Distress (C);
2 Inst. 132.

(d) 1 Eagle on Tithes, 289, 290.

(e) Stat. 20 Hen. III. c. 4.

(f) Stat. 13 Edw. I. c. 46. And
see stat. 3 & 4 Edw. VI. c. 3, s. 2.

(g) Mad. Form. Angl. No. 303,
p. 184.

and the abbot of Robertsbridge had levied a fine in the King's Court of a certain marsh which belonged to their free tenement in Prunhull, of which their predecessors were seised as of right in the time of Henry the king's father (*h*). So the men of Ormadan, to the number of forty, release to the abbess and convent of Dora their rights of common in certain lands (*i*). So, in the reign of King Henry III., Richard de Stoches grants to the monks of Bruerne certain lands in frankalmoigne, and also grants them common of pasture *with the other men* of the same fee (*k*). The men are mentioned generally, not as certain particular tenants, but the whole of the tenants of that fee or feud.

Land means
arable land.

The fact that when "land" is spoken of in legal instruments arable land is always understood, unless the contrary appears, shows the importance attached to arable land, and tends to prove that the tenants of the arable lands in a manor were not merely certain individual tenants, but were in ancient times all the tenants as a class. When every tenant held and lived upon arable land, nothing could be more natural than that by the word "land," arable land should be primarily understood.

Exceptions.

The exceptions to the rule, that common appendant is the common law right of every free tenant of a manor, depend simply on this, that the special nature of certain subjects of tenure renders common appendant inappropriate to their enjoyment. Common appendant was the right which every free tenant of arable land had, by the common law, to depasture upon the lord's wastes all cattle subservient to the tillage and manurance of such land, namely, horses, kine and sheep, which are thence called commonable beasts; and the number of beasts to be put upon the common was as many as were *levant* and *couchant* upon the land,—that is, as many as the land was capable of maintaining on it by its

Commonable
beasts.

(*h*) Abbreviatio Placitorum, p. 32.

(*i*) Mad. Form. Angl. No. 153, p. 88.

(*k*) Mad. Form. Angl. No. 341, pp. 258, 259. See also No. 361, pp. 274, 275.

produce through the winter. Common appendant could not be claimed in respect of a house without any curtilage or yard; for it was truly said, "beasts cannot be rising and lying down on a house, unless it be on the top of the house" (*l*). But a curtilage was supposed to belong to a house or cottage unless the contrary appeared (*m*). So common appendant could not be claimed in respect of ancient meadow or pasture; for the meadow and pasture itself helped to depasture the beasts which tilled and manured the arable land to which it belonged; and meadow and pasture did not require beasts to till it. The tenant who had pasture land of his own would not require to put so many cattle on the lord's wastes; and by custom common appendant might be limited to a certain number of beasts (*n*). But the fact that the tenant might feed his beasts elsewhere did not destroy his claim to common appendant (*o*); and even if arable land was converted into meadow or pasture, the right to common appendant still remained, for the land might be ploughed up again (*p*). In some cases the meadow land was periodically allotted to the owners of the arable land in the manor, giving rise to an exceptional estate of inheritance peculiar to meadow land. The freehold was not in the lord, but in the tenants (*q*); and a feoffment by the tenant of the allotment for the time being allotted to him was sufficient to pass his interest in the whole of the mead (*r*). Meadow or pasture land is then, from its nature, an exception to the ordinary rule which gives common appendant of common right to every freehold. But such exceptions as these do but illustrate and confirm the rule,

No common
for a house.

No common

Lot mead.

(*l*) 2 Brownlow, 101; *Scholes v. Hargreaves*, 5 T. Rep. 46; *Benson v. Chester*, 8 T. Rep. 396.

(*m*) Com. Dig. tit. Common (B).

(*n*) 1 Rol. Abr. tit. Common (G), 4; Com. Dig. tit. Common (B).

(*o*) Year Book, 17 Edw. III. 34 b; 1 Rol. Abr. tit. Common (D), 8.

(*p*) *Tyrringham's case*, 4 Rep.

36 b, 37 b; *Carr v. Lambert*, Law Rep., 1 Exch. 16.

(*q*) *Welden v. Bridgewater*, Cro. Eliz. 421; *Moor*, 302; Co. Litt. 4 a; Rol. Abr. tit. Estate (C). See also *Archæologia*, vol. 33, p. 275; vol. 35, p. 470; *Case and opinion of Sir Orlando Bridgman*, 12 Jur., N. S., pt. 2, p. 103; and see *Pate v. Brownlow*, 1 Keble, 876.

(*r*) Co. Litt. 48 b.

APPENDIX.

that of common right every freeholder is entitled to common appendant in the lord's wastes.

The authorities above cited from Williams's Saunders, Willes's Reports, and Comyns' Digest (s), are strictly in accordance with the principles above stated. And Lord Coke's Commentary on the Statute of Merton, which is cited at length by the Court in the judgment in *Lord Dunraven v. Llewellyn* (t), so far from shaking these authorities, evidently confirms them. The Court, however, says, that common appendant is not a common right of *all tenants*, but belongs only to each grantee, before the statute of *Quia emptores*, of *arable land* by virtue of his individual grant, and as an incident thereto, and is as much a *peculiar right* of the grantee as one derived by express grant or by prescription. But the principle that common appendant is not a peculiar right, but the common right of all tenants, is not only asserted by the authorities above mentioned, and consistent with the language of the legislature and of ancient documents, but it has produced doctrines of law which are undeniable, and which turn solely on the distinction that this kind of common is of common right, whilst other kinds are not. These doctrines are two. First, because common appendant is of common right, therefore a man need not prescribe for it (u). Lord Coke, who lays down this doctrine, had previously said that appendants are ever by prescription (x). Mr. Hargrave, in his note, reconciles the two doctrines thus: that "as appendancy cannot be without prescription, the former always *implies* the latter; and, therefore, if one pleads common appendant, it is unnecessary to add the usual form of prescribing" (y). In other words, common appendant is not a peculiar right belonging to each grantee, but a common right belonging to all, and so well known to the law as such, that it is sufficient in pleading merely to mention its name, without entering

Common appendant need not be prescribed for.

(s) Ante, p 609.

Brev. 179, n. (b).

(t) Ante, p 606.

(x) Co. Litt. 121 b.

(u) Co. Litt. 122 a; Year Book, 21 Hen. VI., 10 a; Fitz. Nat.

(y) Co. Litt. 122 a, n. (2); *Jenkin v. Firian*, Popham, 201.

into a more minute description. Had it been a peculiar right belonging to each grantee, it would have been necessary to set it out, the tenant claiming that he, and all those whose estate he had, from time immemorial used to place so many beasts of such a kind upon such a common. In this respect common appendant resembles the custom of gavel-kind and borough English, which are known to the law and need not be particularly described, whereas any other customary mode of descent requires to be particularly stated (z). Secondly, "If a man purchase part of the land wherein common appendant is to be had, the common shall be apportioned, *because it is of common right*; but not so of a common appurtenant, or of any other common of what nature soever" (a). Here common appendant is distinguished from all other kinds of common, on the simple ground of its being of common right or a right given by the law. *Tyrringham's case* (b) turned on this distinction. The tenant there lost his common by claiming it as annexed to meadow and pasture: whereby was understood *ancient* meadow and pasture, to which, as we have seen (c), common cannot be *appendant*. Common may, however, by a grant or prescription, be *appurtenant* to meadow and pasture; and such in this case it was held to be. The owner of part of the land over which the common was claimed, purchased the premises in respect of which it was claimed, and then demised them to the plaintiff, who put in two cows into the residue of the land over which the right of common had existed. The defendant, who was the farmer of the owner of this land, with a little dog drove out the cows; and it was held that he was justified in so doing. By the union of part of the land wherein the common was to be had with the premises in respect of which it was to be had, the entire right of common was destroyed, because it was merely common *appurtenant*. "Forasmuch as the Court resolved that the common was appurtenant *and not appendant*, and so *against common right*, it was adjudged that by the said purchase all the common was extinct" (d). Common appurtenant is

Common appendant shall
tioned.

Tyrringham's case.

Common

(z) Bac. Abr. tit. Customs (H).

(a) Co. Litt. 122 a.

(b) 4 Rep. 36 b.

(c) Ante, p. 615.

(d) 4 Rep. 38 a.

appurtenant
is "against"
common
right.

against common right because it depends upon a special grant, either expressed or implied from long usage; and the law accordingly allows it to fail altogether whenever it cannot be exercised in its integrity. But common appendant, being of common right, a right common to every freeholder, is favoured by the law, and allowed to be apportioned on the union of the tenements in respect of which it is claimed with part of the lands over which the right is exercised. Had the common been *appendant* in *Tyrringham's case*, it is clear that the Court would have held the plaintiff justified in putting in an apportioned number of cattle on the residue of the lands over which the right of common originally existed.

These considerations would probably be of themselves sufficient to show that the proposition laid down in books of authority, that common appendant is the common law right of every tenant of freehold lands, is as accurate as any general proposition can be, and is not to be explained away into a number of distinct and peculiar grants, made only to certain tenants individually. The Court in *Lord Dunraven v. Llewellyn* assumes as a fact that such grants were actually made in the case before it, according to the explanation given by Lord Coke. And in many cases it may be taken as historically true that such grants were made. But rights of common were far more important in ancient times than they are at present (*e*), and in many places in England they appear to have existed long before the feudal rules of tenure were introduced by the Normans. Lot meads, in particular, were of Saxon or German rather than of Norman origin. And there is reason to believe that the rights of common over common field lands, about which the Court of Exchequer, in the twenty-seventh year of the reign of Queen Elizabeth, confessed themselves "at first altogether ignorant" (*f*), were at least of Saxon, if not in many cases

Common
fields.

(*e*) See Mr. Beale's suggestive Essay on Commons Preservation, Essays, p. 109; Abbreviatio Placitorum, Mich. 4 John, p. 36;

Trin. 4 John, p. 40; Easter, 7 & 8 John, p. 51.

(*f*) *Sir Miles Corbet's case*, 7 Rep. 5 b.

of ancient British origin (*g*). Agriculturists were not then very enterprising. An "assart," or reclamation of waste, Assart. was of rare occurrence (*h*). The British cultivators were often left by the Saxon conquerors, and the Saxons by the Normans; and each retained their ancient customs, which by degrees grew up into rights (*i*). The Norman lawyers applied as best they could the feudal rules of tenure to the state of things they found actually existing. The notions about property were then unripe (*k*). So long as a man could feed his horse or his cow on the waste, put his hogs into the woods to grub for acorns, and cut timber for fuel or repairs, it was not of the slightest consequence to him whether the property in the wastes and woods was in himself or in somebody else. In Domesday, as we have seen, woods are usually measured only by the number of pigs they can feed. Many forests, moors and marshes, being quite unprofitable and often inaccessible, do not appear to have been taken into account. When it became necessary that they should have some legal owner, the lord of the manor was the only person in whom the ownership could be considered to vest. But the right of a tenant of arable land to put his cattle on the waste probably existed in many cases quite irrespective of any actual grant. The tenant and his rights were there already, and the feudal law adapted itself to the existing circumstances, giving to the lord the property in the waste, and to the tenant the right of taking the herbage by the mouths of his cattle.

The following passage from Maine's *Ancient Law* (*l*) Maine on
Primogeniture illustrates the sort of change that probably took place. Speaking of the rule of primogeniture he says:—"The

(*g*) See *Archæologia*, vol. 34, p. 111, vol. 37, p. 383. See also post, as to the Welsh custom of co-tillage. The Saxon term "yard land" is, according to the author's experience, generally applied to lands in common fields.

(*h*) Essarts, or assarts, are mentioned but rarely in Domesday. Sir H. Ellis's Introduction to

Domesday, vol. 1, p. 102.

(*i*) 1 Sharon Turner's *Anglo-Saxons*, 324, 325; 2 *ib.* 542, 543; Palgrave's *Rise and Progress of the English Commonwealth*, vol. 1, pp. 26, 27, 28, 38, 77.

(*k*) See Palgrave, vol. 1, pp. 71 et seq.

(*l*) P. 237, 1st edit.

“ ideas and social forms which contributed to the formation
 “ of the system were unquestionably barbarian and archaic;
 “ but as soon as courts and lawyers were called in to inter-
 “ pret and define it, the principles of interpretation which
 “ they applied to it were those of the latest Roman juris-
 “ prudence, and were therefore excessively refined and
 “ matured. In a patriarchally governed society, the eldest
 “ son may succeed to the government of the agnatic group,
 “ and to the absolute disposal of its property. But he is
 “ not therefore a true proprietor. He has correlative duties
 “ not involved in the conception of proprietorship, but quite
 “ undefined and quite incapable of definition. The later
 “ Roman jurisprudence, however, like our own law, looked
 “ upon uncontrolled power over property as equivalent to
 “ ownership, and did not, and in fact could not, take notice
 “ of liabilities of such a kind that the very conception
 “ of them belonged to a period anterior to regular law.
 “ The contact of the refined and the barbarous notion had
 “ inevitably for its effect the conversion of the eldest son
 “ into legal proprietor of the inheritance. The clerical and
 “ secular lawyers so defined his position from the first; but
 “ it was only by insensible degrees that the younger brother,
 “ from participating on equal terms in all the dangers and
 “ enjoyments of his kinsman, sank into the priest, the soldier
 “ of fortune, or the hanger-on of the mansion. The legal
 “ revolution was identical with that which occurred on a
 “ smaller scale and in quite recent times through the greater
 “ part of the Highlands of Scotland. When called in to
 “ determine the legal powers of the chieftain over the
 “ domains which gave sustenance to the clan, Scottish juris-
 “ prudence had long since passed the point at which it could
 “ take notice of the vague limitations on completeness of
 “ dominion imposed by the claims of the clansmen, and it
 “ was inevitable therefore that it should convert the patri-
 “ mony of many into the estate of one.”

Wales.

A change of a somewhat similar nature appears to have
 taken place in the principality of Wales. The land in
 dispute in the case of *Lord Dunraven v. Llewellyn* was
 situate in the county of Glamorgan in Wales. Wales, as is

well known, was conquered by King Edward the First, who, by the *Statutum Walliæ*, 12 Edw. I., sometimes called the Statute of Rhuddlan, subjected a great part of it, principally the northern portion, to English law (*m*). Before this time large tracts of land had doubtless been given to Englishmen, who vanquished the natives and took their lands. But the rest of Wales was governed by its own laws and customs, of which copies and translations were published in the year 1841, under the direction of the Commissioners of Public Records. In one of these it is thus provided:—

“ Three things that are not to be done without the permission
 “ of the lord and his court: building on a waste, ploughing
 “ on a waste, and clearing wild land of wood on a waste; and
 “ there shall be an action for theft against such as shall do
 “ so, *because every wild and waste belongs to the country and*
 “ *kindred in common*, and no one has a right to exclusive
 “ possession of much or little of land of that kind” (*n*).

Again, it is said that “every habitation ought to have a
 “ bye road to the common waste of the ‘trev’ or vill” (*o*).

So an oak, a birch or a witch elm could not be cut without the permission of the country and lord (*p*); but any person might take fuel from a decayed or hollow tree (*q*). As land was inalienable, and descended equally amongst all the sons, the landowners in the same place were probably in most cases of kin to one another. Hume says in his History of England (*r*), speaking of the time of the conquest by Edw. I. —“The rude and simple manners of the natives, as well
 “ as the mountainous situation of their country/ had made
 “ them entirely neglect tillage and trust to pasturage alone
 “ for their subsistence.” This statement, however, appears too sweeping. The wars in which they were then engaged

(*m*) See 1 Bl. Com. 93, 94; Hale’s Hist. of Common Law, pp. 248 et seq.; 2 Reeves’s Hist. Eng. Law, ch. 9, p. 92.

(*n*) *Cyvreithiau Cymru*, Welsh Laws, bk. 13, ch. 2, No. 101, p. 655, fol. edit. by Record Commissioners.

(*o*) Welsh Laws, bk. 9, ch. 25, No. 8, p. 525, fol. edit. by Record Commissioners.

(*p*) Ibid. bk. 13, ch. 2, No. 238.

(*q*) Ibid. bk. 10, ch. 7, No. 9; bk. 13, ch. 2, No. 102.

(*r*) Vol. 2, pp. 240, 241, edit. 1802.

were more probably the cause of their neglect of tillage. Many of their ancient laws relate to agriculture; their lands appear to have been cultivated by a system of co-tillage, the land when ploughed being divided into twelve parts—the first for the ploughman, another to the irons (*s*), another to the driver, another to the plough, and the rest to the owners of the eight oxen that formed the team (*t*). Co-tillage of waste is elsewhere said to be one of the immunities of an innate Cymro or Welshman (*u*), and without co-tillage it is gravely said no country can support itself in peace and social union (*x*). No trace appears, so far as the author has been able to discover, of any mere right of common of pasture, according to the notions of English law. At the time of the conquest, Llewellyn, the native prince, granted four “cantrevs,” or four hundred trevs or vills, to the king, besides other lands; and in the document by which this grant was effected the king grants that all holding lands in the four cantrevs and other lands aforesaid which our lord the king holds in his own hands (except those to whom the king shall refuse to do this favour), shall hold them as freely and fully as before the war they were accustomed to hold, and shall enjoy the same liberties and customs which before they were accustomed to enjoy; so that they, who held of the prince, for the future shall hold those lands of the king and his heirs by the accustomed services (*y*). This grant was substantially carried out by the Statute of Wales before mentioned. But the alteration made by the introduction of writs similar to those then used in England of necessity led to a system of law conformable to those writs. Amongst other writs specifically introduced

(*s*) Compare Ellis's Introduction to Domesday, p. 266, where it appears that certain tenants were bound to furnish irons for the lord's ploughs.

(*t*) The Venetian Code, bk. 3, ch. 24, par. 3, p. 153, fol. edit. by Record Commissioners.

(*u*) Welsh Laws, bk. 13, ch. 2,

No. 83, p. 651, fol. edit.

(*x*) Ibid. bk. 13, ch. 2, No. 46, p. 638.

(*y*) *Articulorum pacis cum rege Angliæ ratificatio per Llewellynum principem Walliæ*, A.D. 1277, Rymer's *Fœdera*, vol. 2, pp. —90.

by the statute, was the writ of novel disseisin of common of pasture. This writ, as given by the statute, is in the following form: "A. complains to us that B. and C. unjustly and without judgment disseised him of common of pasture, which belongs to his free tenement in such a vill, or another if the case requires it, after the peace proclaimed in Wales in the twelfth year of our reign" (z). This form of writ is similar to that given in Fitzherbert's *Natura Brevium* (a), and "lieth," as he says, "where a man hath common of pasture appendant or appurtenant to his manor, or house or land, which he hath for term of life, or in fee simple or in fee tail; if he be disturbed of his common, so that he cannot take it as he ought to do, he shall have an assize of novel disseisin thereof." A Welshman, therefore, who had been disturbed in his enjoyment of the common wastes, would have had no remedy but to sue out this writ.

Writ of novel disseisin of common of pasture.

The nature of the remedy ascertained to an English lawyer the nature of the right. The common now belonged to the tenement. The refined distinctions between appendant and appurtenant are not noticed in the writ, and were probably the work of a later age. But here was an incorporeal tenement only, belonging to a corporeal one. The writ, as Fitzherbert remarks, does not say that the claimant is disseised of his freehold, as was done in the case of land, but only of his common of pasture 'belonging to his freehold' (b). Here was an end of any claim to the soil of the waste. All the tenants who had been accustomed to put their cattle on the waste had their rights defined more accurately than before, but narrowed also to fit the definition. This appears to have been the actual origin of common appendant in most parts of the principality of Wales; and if this be so, that right, in that country at least, has had its origin, not in a number of actual separate grants made by the lord to certain tenants, but in the adaptation of the ancient rights

The remedy ascertained

(z) P. 866 of fol. edit. by Record Commissioners.

(b) Fitz. Nat. Brev. vol. 2, p. 179.

(a) Vol. 2, p. 179.

of the freeholders as a class to the remedies prescribed by English law.

County of
Glamorgan
not granted
Llewellyn.

Conquered by
Robert Fitz-
hamon.

Subjected to
the laws of
England.

The county of Glamorgan, in which the lands in dispute in the case of *Lord Dunraven v. Llewellyn* were situate, does not appear to have been comprised in the grant made by Prince Llewellyn to King Edward I. (c). The lordship of this county appears to have been acquired by the crown from Anne, Countess of Warwick, whose daughter married Richard, Duke of Gloucester, afterwards Richard III., King of England. Anne, Countess of Warwick, was a descendant of one Robert Fitzhamon, (a great lord and kinsman of William the Conqueror,) who acquired the lordship of Glamorgan by conquest from the Welsh, in the fourth year of the reign of King William Rufus, and who gave the castle and manor of Ogmore to William de Londres, knight, in reward for his services (d). And by a statute of the reign of King Henry VIII. (e), it was provided that after the feast of All Saints then next coming, justice should be ministered and executed to the king's subjects and inhabitants of the said county of Glamorgan, according to the laws, customs and statutes of the realm of England, and after no Welsh laws, in such form and fashion as justice was ministered and used to the king's subjects within the three shires of North Wales. This statute preserved the equal descent amongst all the sons then prevalent in Wales (f), which, however, was abolished by a subsequent Act of the same

In the case of *Lord Dunraven v. Llewellyn*, the lord who claimed the land in dispute as part of the waste tendered, as we have seen, evidence of reputation—that so it was considered by the commoners. This evidence was rejected, and

(c) See an interesting article on the political geography of Wales by Henry Salusbury Milman, Esq., in the *Archæologia*, vol. 38, p. 12.

(d) Stradling's Winning of Glamorgan from the Welsh, printed in Caradoc, of Llancarvan's His-

tory of Wales, A.D. 1774, pp. i., xvi., xxix., xxxi.

Stat. 27 Hen. VIII. c. 26, s. 14.

(f) Stat. 27 Hen. VIII. c. 26, s. 35.

(g) Stat. 34 & 35 Hen. VIII. c. 26, ss. 91, 128.

the commoners were not considered as a body or class, because certain tenants only—namely, the tenants of arable lands—have by law a right to common appendant. If, how- Modus.
 ever, the dispute had been between the rector of the parish and an occupier of arable land, with respect to a parochial modus payable in lieu of great tithe, evidence of reputation would have been clearly admissible(*h*). And yet the question would have been one which did not concern every occupier of land in the parish, for the occupier of pasture land paid no great tithe. The tithe of agistment of pasture was a small tithe only(*i*). This exception, however, arising as it did from the nature of the subject of occupancy, did not prevent the other occupiers from being treated as a class. So in the case of common appendant, the exceptions which arise from the nature of certain holdings should not prevent the claimants, who all claim under one common title—namely, a right given by the law itself—from being considered as a class of persons, with respect to whose rights evidence of reputation is admissible.

If the commoners who claimed common appendant for their commonable beasts had claimed by the custom of the manor a right to put on the waste beasts not commonable, such as geese and pigs, evidence of reputation would have been admissible on the ground that a *custom* was in dispute(*k*). But such evidence is admissible in the case of a custom solely on the ground that a custom affects a class or body of persons in a particular place(*l*). Can it be said that the commoners are less a class when the custom of the manor coincides with the common law, which is the general custom of the realm, than when it differs from it? Custom.

It may be said that common appendant at the present day is comparatively rare, that many such rights have now become extinguished, and, that, supposing a single right to Extinguishment of rights.

(*h*) *White v. Lisle*, 4 Mad. 214, 225.

(*i*) 1 Eagle on Tithes, 44.

(*k*) *Damerell v. Protheroe*, 10 Q. B. 20; *Prichard v. Powell*, 10

Q. B. 589, 603, as explained in *Lord Dunraven v. Llewellyn*, ante, p. 608.

(*l*) *Jones v. Rolt*, 10 Q. B. 581, 583, 620, 635.

Customs.

remain in a manor, ought evidence of reputation to be given in support of it? The answer is, that this depends upon the manner in which the claimant frames his claim. He may choose to rely on his continuous enjoyment of the right of common in respect of his tenement, or he may claim the benefit of the provisions, with liability to the limitations, of the Prescription Act (*m*); but he will not then be able to avail himself of the former exercise of similar rights in respect of other tenements holden of the same manor. If, however, he claim his common as appendant, there seems no reason why, in relying on a general right, he should not have the benefit of evidence of reputation as to similar rights once existing but now extinct. Reputation is admissible as to the boundaries of a manor, and none the less though the manor as such has ceased to exist (*n*). The cesser, therefore, of any general right ought not to prevent the admission of evidence of reputation as to its former existence. The cases as to customs afford an analogy. If all the copyholds but one, parcel of a certain manor, should become extinct, the tenant of that one may, if he pleases, allege a customary right of common as belonging to that tenement only (*o*); but in that case he cannot adduce evidence of the enjoyment of a similar right by other tenants of the same manor (*p*). He must prove the custom as he alleges it (*q*). He may, however, if he pleases, allege the right as belonging by custom to all the customary tenements of the manor (*r*), and in that case evidence as to the other tenements will be admissible in his behalf; but at the same time he will expose his claim to be met by evidence relating to any other tenement in the manor standing in the same situation as his own (*s*).

(*m*) Stat. 2 & 3 Will. IV. c. 71, ante, p. 555. †

(*n*) *Steel v. Prickett*, 2 Stark. 463; *Doe d. Molesworth v. Sleeman*, 9 Q. B. 298; and see *Barnes v. Maunson*, 1 Mau. & Sel. 77.

(*o*) Bac. Abr. tit. Copyhold (E); *Foiston and Crachroode's Case*, 4 Rep. 31 b.

(*p*) *Wilson v. Page*, 4 Esp. 71.

(*q*) *Dunstan v. Tresider*, 5 T. Rep. 2.

(*r*) See *Potter v. North*, 1 Wms. Saund. 345, 348; 1 Lev. 268.

(*s*) 1 Scriv. Cop. 597, 3rd edit.; *Cort v. Birkbeck*, 1 Doug. 218, 219, 223; *Freeman v. Phillipps*, 4 Mau. & Sel. 486, 495.

For these reasons the author is of opinion that the case of *Lord Dunraven v. Llewellyn* was, on the point in question, wrongly decided. There was another point decided, namely this, that evidence of actual exercise is not essential to the admission of evidence of reputation. With this decision the author has no fault to find.

APPENDIX (D).

Referred to, pp. 223, 239, 353, 534, 535, 573, 574.

Bargain and Sale, or Lease for a Year. (See p. 221.)

Date.	THIS INDENTURE made the first day of January (a) [in the third year of our Sovereign Lady Queen Victoria by the grace of God of the United Kingdom of Great Britain and Ireland Queen Defender of the Faith and] in the year of
Parties.	our Lord 1840 BETWEEN A. B. of Cheapside in the city of London Esquire of the one part and C. D. of Lincoln's Inn in the county of Middlesex Esquire of the other part
Testatum. Consideration.	WITNESSETH that the said A. B. in consideration of five shillings (b) of lawful money of Great Britain to him in hand paid by the said C. D. at or before the sealing and delivery of these presents (the receipt whereof is
Bargain and sale.	hereby acknowledged) HATH bargained and sold and by these presents DOTH bargain and sell unto the said C. D.
Parcels.	his executors administrators and assigns ALL that messuage or tenement situate lying and being at &c. and commonly
General words.	called or known by the name of &c. [<i>here describe the premises</i>] Together with all and singular the houses outhouses edifices buildings barns dovehouses stables yards gardens orchards lights easements ways paths passages waters watercourses trees woods underwoods commons and commonable rights hedges ditches fences liberties privileges emoluments commodities advantages hereditaments and appurtenances whatsoever to the said messuage or tenement lands and hereditaments or any part thereof belonging or in anywise appertaining or with the same or any part thereof now or at any time heretofore usually held used occupied or enjoyed [or accepted reputed taken or known as part parcel or member thereof] And the reversion and

(a) The words within brackets were latterly omitted.

(b) Ante, p. 188.

reversions remainder and remainders yearly and other rents issues and profits of the same premises and every part thereof To HAVE AND TO HOLD the said messuage or tenement lands and hereditaments and all and singular other the premises hereinbefore bargained and sold or intended so to be with their and every of their rights members and appurtenances unto the said C. D. his executors administrators and assigns from the day next before the day of the date of these presents for and during and until the full end and term of one whole year thence next ensuing and fully to be complete and ended YIELDING AND PAYING therefor the rent of one peppercorn (c) at the expiration of the said term if the same shall be lawfully demanded To the intent and purpose that by virtue of these presents and of the statute for transferring uses into possession the said C. D. may be in the actual possession of the same premises and may thereby be enabled to accept and take a grant and release of the freehold reversion and inheritance of the same premises and of every part and parcel thereof to the said C. D. his heirs and assigns to the uses and for the intents and purposes to be declared by another indenture of three parts already prepared and intended to be dated the day next after the day of the date hereof IN WITNESS whereof the said parties to these presents have hereunto set their hands and seals the day and year first above written.

The Release.

THIS INDENTURE made the second day of January (d) [in the third year of the reign of our Sovereign Lady Queen Victoria by the grace of God of the United Kingdom of Great Britain and Ireland Queen Defender of the Faith and] in the year of our Lord 1840 BETWEEN A. B. of Cheapside in the city of London Esquire of the first part C. D. of Lincoln's Inn in the county of Middlesex Esquire of the second part and Y. Z. of Lincoln's Inn aforesaid

(c) *Ante*, p. 293.

(d) The words within brackets were latterly omitted.

Recital of the conveyance to the vendor.

Recital of the contract for sale.

Testatum.
Consideration.

Receipt.

Operative words.

gentleman of the third part (e) WHEREAS by indentures of lease and release bearing date respectively on or about the first and second days of January 1838 and respectively made or expressed to be made between E. F. therein described of the one part and the said A. B. of the other part for the consideration therein mentioned the messuage or tenement lands and hereditaments hereinafter described and intended to be hereby granted with the appurtenances were conveyed and assured by the said E. F. unto and to the use of the said A. B. his heirs and assigns for ever AND WHEREAS the said A. B. hath contracted and agreed with the said C. D. for the absolute sale to him of the inheritance in fee simple in possession of and in the said messuage or tenement lands and hereditaments hereinbefore referred to and hereinafter described with the appurtenances free from all incumbrances at or for the price or sum of one thousand pounds NOW THIS INDENTURE WITNESSETH that for carrying the said contract for sale into effect and in consideration of the sum of one thousand pounds of lawful money of Great Britain to the said A. B. in hand well and truly paid by the said C. D. upon or immediately before the sealing and delivery of these presents (the receipt of which said sum of one thousand pounds in full for the absolute purchase of the inheritance in fee simple in possession of and in the messuage or tenement lands and hereditaments hereinafter described and intended to be hereby granted and released with the appurtenances he the said A. B. doth hereby acknowledge and of and from the same and every part thereof doth acquit release and discharge the said C. D. his heirs executors administrators and assigns [and every of them for ever by these presents]) He the said A. B. HATH granted bargained sold aliened released and confirmed and by these presents DOTH grant bargain sell alien release and confirm unto the said C. D. (in his actual

(e) The reason why Y. Z. is made a party to this deed is, that the widow of C. D., if married on or before the 1st of January, 1834, may be barred or deprived of her dower. See ante, pp. 352, 353.

If this should not be intended, the deed would be made between A. B. of the one part, and C. D. of the other part, as in the deed given, p. 227.

possession now being by virtue of a bargain and sale to him thereof made by the said A. B. in consideration of five shillings in and by an indenture bearing date the day next before the day of the date of these presents for the term of one whole year commencing from the day next before the day of the date of the same indenture of bargain and sale and by force of the statute made for transferring uses into possession) and to his heirs (*f*) ALL that messuage or tenement situate lying and being at &c. commonly called or known by the name of &c. [*here describe the premises*] Together with all and singular the houses outhouses edifices buildings barns dovecotes stables yards gardens orchards lights easements ways paths passages waters watercourses trees woods underwoods commons and commonable rights hedges ditches fences liberties privileges emoluments commodities advantages hereditaments and appurtenances whatsoever to the said messuage or tenement lands hereditaments and premises hereby granted and released or intended so to be or any part thereof belonging or in anywise appertaining or with the same or any part thereof now or at any time heretofore (*g*) usually held used occupied or enjoyed [or accepted reputed taken or known as part parcel or member thereof] And the reversion and reversions remainder and remainders yearly and other rents issues and profits of the same premises and every part thereof And all the estate right title interest use trust inheritance property possession benefit claim and demand whatsoever both at law and in equity of him the

Parcels.

General words.

Estate.

(*f*) If the deed were dated at any time between the month of May, 1841 (the date of the statute 4 & 5 Vict. c. 21; ante, pp. 216, 223), and the first of January, 1845 (the time of the commencement of the operation of the Transfer of Property Act, ante, p. 216), the form would be as follows:—
 “He the said A. B. DORN by these presents (being a deed of release made in pursuance of an Act of Parliament made and passed in

“the fourth year of the reign of
 “her present Majesty Queen Victoria intituled An Act for rendering a Release as effectual
 “for the Conveyance of Freehold Estates as a Lease and Release
 “by the same Parties) grant bargain sell alien release and confirm unto the said C. D. and his heirs.”

As to the form in a deed of grant, see ante, pp. 228, 572, 581.

(*n*)

said A. B. in to out of or upon the said messuage or tenement lands hereditaments and premises hereby granted and released or intended so to be and every part and parcel of the same with their and every of their appurtenances And all deeds evidences and writings relating to the title of the said A. B. to the said hereditaments and premises hereby granted and released or intended so to be now in the custody of the said A. B. or which he can procure without suit at law or in equity To HAVE AND TO HOLD the said messuage or tenement lands and hereditaments hereinbefore described and all and singular other the premises hereby granted and released or intended so to be with their and every of their rights members and appurtenances unto the said C. D. and his heirs (*h*) To such uses upon and for such trusts intents and purposes and with under and subject to such powers provisoes declarations and agreements as the said C. D. shall from time to time by any deed or deeds instrument or instruments in writing with or without power of revocation and new appointment to be by him sealed and delivered in the presence of and to be attested by two or more credible witnesses direct limit or appoint And in default of and until any such direction limitation or appointment and so far as any such direction limitation or appointment if incomplete shall not extend To the use of the said C. D. and his assigns for and during the term of his natural life without impeachment of waste And from and after the determination of that estate by forfeiture or otherwise in his lifetime To the use of the said X. Z. and his heirs during the life of the said C. D. In trust nevertheless for him the said C. D. and his assigns and after the decease of the said C. D. To the use of the said C. D. his heirs and assigns for ever And the said A. B. doth hereby for himself his heirs (*i*) executors and administrators covenant promise and agree with and to the said C. D. his appointees heirs and assigns in manner follow-

And all deeds.

Habendum.

Uses to bar dower.

Covenants for title.

(*h*) If C. D. was not married on or before the 1st of January, 1834, or if, having been so married, the dower of his widow should not be intended to be barred, the

form would here simply be "To the use of the said C. D. his heirs and assigns for ever."

(*i*) See ante, pp. 104, 533, 534.

APPENDIX.

ing that is to say that for and notwithstanding any act deed matter or thing whatsoever by him the said A. B. or any person or persons lawfully or equitably claiming or to claim by from through under or in trust for him made done or committed to the contrary (k) [he the said A. B. is at the time of the sealing and delivery of these presents lawfully rightfully and absolutely seised of or well and sufficiently entitled to the messuage or tenement lands hereditaments and premises hereby granted and released or intended so to be with the appurtenances of and in a good sure perfect lawful absolute and indefeasible estate of inheritance in fee simple without any manner of condition contingent proviso power of revocation or limitation of any new or other use or uses or any other matter restraint cause or thing whatsoever to alter change charge revoke make void lessen or determine the same estate And that for and notwithstanding any such act matter or thing as aforesaid] he the said A. B. now hath in himself good right full power and lawful and absolute authority to grant bargain sell alien release and confirm the said messuage or tenement lands hereditaments and premises hereinbefore granted and released or intended so to be with their appurtenances unto the said C. D. and his heirs to the uses and in manner aforesaid and according to the true intent and meaning of these presents And that the same messuage or tenement lands hereditaments and premises with the appurtenances shall and lawfully may accordingly from time to time and at all times hereafter be held and enjoyed and the rents issues and profits thereof received and taken by the said C. D. his appointees heirs and assigns to and for his and their own absolute use and benefit without any lawful let suit trouble denial hindrance eviction ejection molestation disturbance or interruption whatsoever of from or by the said A. B. or any person or persons lawfully or equitably claiming or to claim by from through under or in trust for him And that (l) free and clear and freely and clearly acquitted

That the
That the ven
ri
For quiet en
joyment.
For freedom

(k) See ante, p. 535.

(l) The word *that* is here a

For further
assurance.

exonerated and discharged or otherwise by him the said A. B. his heirs executors or administrators well and sufficiently saved defended kept harmless and indemnified of from and against all and all manner of former and other [gifts grants bargains sales leases mortgages jointures dowers and all right and title of dower uses trusts wills entails statutes merchant and of the staple recognizances judgments extents executions annuities legacies payments rents and arrears of rent forfeitures re-entries cause and causes of forfeiture and re-entry and of from and against all and singular other] estates rights titles charges and incumbrances whatsoever had made done committed executed or willingly suffered by him the said A. B. or any person or persons lawfully or equitably claiming or to claim by from through under or in trust for him And moreover that he the said A. B. and his heirs and all and every persons and person having or lawfully claiming or who shall or may have or lawfully claim any estate right title or interest whatsoever at law or in equity in to or out of the said messuage or tenement lands hereditaments and premises hereinbefore granted and released or intended so to be with their appurtenances by from through under or in trust for him or them shall and will from time to time and at all times hereafter upon every reasonable request and at the costs and charges of the said C. D. his appointees heirs and assigns make do and execute or cause or procure to be made done and executed all and every or any such further and other lawful and reasonable acts deeds things grants conveyances and assurances in the law whatsoever for further better more perfectly and effectually granting releasing conveying and assuring the said messuage or tenement lands hereditaments and premises hereinbefore granted and released or intended so to be with their appurtenances unto the said C. D. and his heirs to the uses and in manner aforesaid and according to the true intent and meaning of these presents as by him the said C. D. his appointees heirs or assigns or his or their counsel in the law shall or may be reasonably advised or devised and required [so that no such further assurance or assurances contain or imply any further or any other warranty or covenant

than against the person or persons who shall make and execute the same and his her or their heirs executors and administrators' acts and deeds only and so that the person or persons who shall be required to make and execute any such further assurance or assurances be not compelled or compellable for making or doing thereof to go or travel from his her or their dwelling or respective dwellings or usual place or places of abode or residence] IN WITNESS, &c.

On the back is endorsed the attestation and further receipt as follows :—

Signed sealed and delivered by the within-named A. B. C. D. and Y. Z. in the presence of

John Doe of London Gent.

Richard Roe Clerk to *Mr. Doe*.

Received the day and year first within written]
of and from the within-named C. D. the sum
of One Thousand Pounds being the considera- £1000
tion within mentioned to be paid by him to
me.

(Signed) A. B.

Witness *John Doe*.

Richard Roe.

APPENDIX (E).

Referred to, p. 276, n. (z).

ON the decease of a woman entitled by descent to an estate in fee simple, is her husband, having had issue by her entitled, according to the present law, to an estate for life, by the curtesy of England, in the whole or any part of her share? (a).

In order to answer this question satisfactorily, it will be necessary, first, to examine into the principles of the ancient law, and then to apply those principles, when ascertained, to the law as at present existing. Unfortunately the authorities whence the principles of the old law ought to be derived do not appear to be quite consistent with one another; and the consequence is, that some uncertainty seems unavoidably to hang over the question above propounded. Let us, however, weigh carefully the opposing authorities, and endeavour to ascertain on which side the scale preponderates.

Littleton, "not the name of the author only, but of the law itself," thus defines curtesy: "Tenant by the curtesie of England is where a man taketh a wife seised in fee simple or in fee tail general, or seised as heir in tail especial, and hath issue by the same wife, male or female, born alive, albeit the issue after dieth or liveth, yet if the wife dies, the husband shall hold the land during his life by the law of England. And he is called tenant by the curtesie of England, because this is used in no other realme, but in England only" (b). And, in a subsequent section, he adds, "Memorandum, that in every case where a man taketh a wife seised of such an

(a) The substance of the following observations appeared in the "Jurist" newspaper for

March 14, 1846.

(b) Litt. s. 35.

estate of tenements, &c., as the issue which he hath by his wife may by possibility inherit the same tenements of such an estate as the wife hath, *as heir to the wife*; in this case, after the decease of the wife, he shall have the same tenements by the curtesie of England, *but otherwise not*" (c). "Memorandum," says Lord Coke, in his Commentary (d), "this word doth ever betoken some excellent point of learning." Again, "*As heir to the wife*. This doth imply a secret of law; for, except the wife be actually seised, the heir shall not (as hath been said) make himself heir to the wife; *and this is the reason*, that a man shall not be tenant by the curtesie of a seisin in law." Here, we find it asserted by Littleton, that the husband shall not be tenant by the curtesy, unless he has had issue by his wife capable of inheriting the land *as her heir*; and this is explained by Lord Coke to be such issue as would have traced their descent from the wife, as the stock of descent, according to the maxim, "*seisina facit stipitem*." Unless an actual seisin had been obtained by the wife, she could not have been the stock of descent; for the descent of a fee simple was traced from the person last actually seised; "*and this is the reason*," says Lord Coke, "that a man shall not be tenant by the curtesy of a mere seisin in law." The same rule, with the same reason for it, will also be found in *Paine's case* (e), where it is said, "And when Littleton saith, *as heir to the wife*, those words are very material; for that is *the true reason* that a man shall not be tenant by the curtesy of a seisin in law; for, in such case, the issue ought to make himself heir to him who was last actually seised." The same doctrine again appears in *Blackstone* (f). "And this seems to be the principal reason why the husband cannot be tenant by the curtesy of any lands of which the wife was not actually seised; because, in order to entitle himself to such estate, he must have begotten issue that may be heir to the wife; but no one, by the standing rule of law, can be heir to the ancestor of any land, whereof the ancestor was not actually seised; and, therefore, as the husband had never begotten

(c) Litt. s. 52.

(d) Co. Litt. 40 a.

(e) 8 Rep. 36 a.

(f) 2 Black. Com. 128.

any issue that can be heir to those lands, he shall not be tenant of them by the curtesy. And hence," continues Blackstone in his usual laudatory strain, "we may observe, with how much nicety and consideration the old rules of law were framed, and how closely they are connected and interwoven together, supporting, illustrating and demonstrating one another." Here we have, indeed, a formidable array of authorities, all to the point, that, in order to entitle the husband to his curtesy, his wife must have been the stock from whom descent should have been traced to her issue; for the principal and true reason that there could not be any curtesy of a seisin in law is stated to be, that the issue could not, in such a case, make himself heir to the wife, because his descent was then required to be traced from the person last actually seised.

Let us, then, endeavour to apply this principle to the present law. The act for the amendment of the law of inheritance (*g*) enacts (*h*), that, in every case, descent shall be traced from the purchaser. On the decease of a woman entitled by descent, the descent of her share is, therefore, to be now traced, not from herself, but from her ancestor, the purchaser from whom she inherited. With respect to the persons to become entitled, as heir to the purchaser on this descent, if the woman be a coparcener, the question arises, which has already been discussed (*i*), whether the surviving sister equally with the issue of the deceased, or whether such issue solely, are now entitled to inherit? And the conclusion at which we arrived was, that the issue solely succeeded to their mother's share. But, whether this be so or not, nothing is clearer than that, on the decease of a woman entitled by descent, the persons who next inherit take as heir to the purchaser, and not to her; for, from the purchaser alone can descent now be traced; and the mere circumstance of having obtained an actual seisin does not now make the heir the stock of descent. How, then, can her husband be entitled to hold her lands as tenant by the curtesy? If

3 & 4 Will. IV. c. 106.

(i) Appendix (B), ante, p. 591.

(h) Sect. 2.

tenancy by the curtesy was allowed of those lands only of which the wife had obtained actual seisin, because it was a necessary condition of curtesy that the wife should be the stock of descent, and because an actual seisin alone made the wife the stock of descent, how can the husband obtain his curtesy in any case where the stock of descent is confessedly not the wife, but the wife's ancestor? Amongst all the recent alterations of the law, the doctrine of curtesy has been left untouched; there seems, therefore, to be no means of determining any question respecting it, but by applying the old principles to the new enactments, by which, indirectly, it may be affected. So far, then, as at present appears, it seems a fair and proper deduction from the authorities, that, whenever a woman has become entitled to lands by descent, her husband cannot claim his curtesy, because the descent of such lands, on her decease, is not to be traced from her.

But, by carrying our investigations a little further, we may be disposed to doubt, if not to deny, that such is the law; not that the conclusion drawn is unwarranted by the authorities, but the authorities themselves, may, perhaps, be found to be erroneous. Let us now compare the law of curtesy of an estate tail with the law of curtesy of an estate in fee simple.

In the section of Littleton, which we have already quoted (*k*), it is laid down, that, if a man taketh a wife *seised as heir* in tail especial, and hath issue by her, born alive, he shall, on her decease, be tenant by the curtesy. And on this Lord Coke makes the following commentary: "And here Littleton intendeth a seisin in deed, if it may be attained unto. As if a man dieth seised of lands in fee simple or *fee tail* general, and these lands descend to his daughter, and she taketh a husband and hath issue, *and dieth before any entry*, the husband shall not be tenant by the curtesy, and yet, in this case, she had a seisin in law; but, if she or her husband had, during her life, entered, he should have been tenant by the curtesy" (*l*). Now, it is

(*k*) Sect. 35.

(*l*) Co. Litt. 29 a.

well known that the descent of an estate tail is always traced from the purchaser or original donee in tail. The actual seisin which might be obtained by the heir to an estate tail never made him the stock of descent. The maxim was, "*Possessio fratris de feudo simplici facit sororem esse hæredem.*" Where, therefore, a woman who had been seised as heir or coparcener in tail died, leaving issue, such issue made themselves heir not to her, but to her ancestor, the purchaser or donee; and whether the mother did or did not obtain actual seisin was, in this respect, totally immaterial. When actual seisin was obtained, the issue still made themselves heir to the purchaser only, and yet the husband was entitled to his curtesy. When actual seisin was not obtained, the issue were heirs to the purchaser as before; but the husband lost his curtesy. In the case of an estate tail, therefore, it is quite clear that the question of curtesy or no curtesy depended entirely on the husband's obtaining for his wife an actual seisin, and had nothing to do with the circumstance of the wife's being or not being the stock of descent. The reason, therefore, before mentioned given by Lord Coke, and repeated by Blackstone, cannot apply to an estate tail. An actual seisin could not have been required *in order* to make the wife the stock of descent, because the descent could not, under any circumstances, be traced from her, but must have been traced from the original donee to the heir of *his* body *per formam doni*.

Again, if we look to the law respecting curtesy in incorporeal hereditaments, we shall find that the reason above given is inapplicable; for the husband, on having issue born, was entitled to his curtesy out of an advowson and a rent, although no actual seisin had been obtained, in the wife's lifetime, by receipt of the rent or presentation to the advowson (n). And yet, in order to make the wife the stock of descent as to such hereditaments, it was necessary that an actual seisin should be obtained by her (o). The husband, therefore, was entitled to his curtesy where the

(n) Watk. Descents, 39 (47, 4th ed.).

(o) Watk. Descents, 60 (67, 4th ed.).

descent to the issue was traced from the ancestor of his wife, as well as where traced from the wife herself. In this case, also, the right of curtesy was, accordingly, independent of the wife's being or not being the stock from which the descent was to be traced.

We are driven, therefore, to search for another and more satisfactory reason why an actual seisin should have been required to be obtained by the wife, in order to entitle her husband to his curtesy out of her lands; and such a reason is furnished by Lord Coke himself, and also by Blackstone. Lord Coke says (*p*), "*Where lands or tenements descend to the husband, before entry he hath but a seisin in law, and yet the wife shall be endowed, albeit it be not reduced to an actual possession, for it lieth not in the power of the wife to bring it to an actual seisin, as the husband may do of his wife's land when he is to be tenant by curtesy, which is worthy the observation.*" It would seem from this, therefore, that the reason why an actual seisin was required to entitle the husband to his curtesy was, that his wife may not suffer by his neglect to take possession of her lands; and, in order to induce him to do so, the law allowed him curtesy of all lands of which an actual seisin had been obtained, but refused him his curtesy out of such lands as he had taken no pains to obtain possession of. This reason also is adopted by Blackstone from Coke: "*A seisin in law of the husband will be as effectual as a seisin in deed, in order to render the wife dowable; for it is not in the wife's power to bring the husband's title to an actual seisin, as it is in the husband's power to do with regard to the wife's lands; which is one reason why he shall not be tenant by the curtesy but of such lands whereof the wife, or he himself, in her right, was actually seised in deed*" (*q*). The more we investigate the rules and principles of the ancient law, the greater will appear the probability that this reason was indeed the true one. In the troublous times of old, an actual seisin was not always easily acquired. The doctrine of continual claim shows that peril was not unfrequently incurred in entering

(*p*) Co. Litt. 31 a.

(*q*) 2 Black. Com. 131.

on lands for the sake of asserting a title ; for, in order to obtain an actual seisin, any person entitled, if unable to approach the premises, was bound to come as near as he dare (*r*). And "it is to be observed," says Lord Coke, "that every doubt or fear is not sufficient, for it must concern the safety of the person of a man, and not his houses or goods; for if he fear the burning of his houses or the taking away or spoiling his goods, this is not sufficient" (*s*). That actual seisin should be obtained was obviously most desirable, and nothing could be more natural or reasonable than that the husband should have no curtesy where he had failed to obtain it. Perkins seems to think that this was the reason of the rule ; for in his Profitable Book he answers an objection to it, founded on an extreme case. "But if possession in law of lands or tenements in fee descend unto a married woman, which lands are in the county of York, and the husband and his wife are dwelling in the county of Essex, and the wife dieth within one day after the descent, so as the husband could not enter during the coverture, for the shortness of the time, yet he shall not be tenant by the curtesy, &c. ; and yet, according to common pretence, there is no *default in the husband*. But it may be said that the husband of the woman, before the death of the ancestor of the woman, might have spoken unto a man dwelling near unto the place where the lands lay, to enter for the woman, as in her right, immediately after the death of her ancestor," &c. (*t*). This reason for the rule is also quite consistent with the circumstance that the husband was entitled to his curtesy out of incorporeal hereditaments, notwithstanding his failure to obtain an actual seisin. For if the advowson were not void, or the rent did not become payable during the wife's life, it was obviously impossible for the husband to present to the one or receive the other ; and it would have been unreasonable that he should suffer for not doing an impossibility, the being "*impotentia excusat legem*." This is the reason, indeed, usually given to explain this circumstance ; and it

(*r*) Litt. ss. 419, 421.

(*t*) Perk. 470.

(*s*) Co. Litt. 253 b.

will be found both in Lord Coke (u) and Blackstone (x). This reason, however, is plainly at variance with that mentioned in the former part of this paper, and adduced by them to explain the necessity of an actual seisin, in order to entitle the husband to his curtesy out of lands in fee simple.

There still remains, however, the section of Littleton, to which we have before referred (y), as an apparent authority on the other side. Littleton expressly says, that when the issue may, by possibility, inherit, *of such an estate as the wife hath, as heir to the wife*, the husband shall have his curtesy, but *otherwise not*; and we have seen that, according to Lord Coke's interpretation, to inherit *as heir to the wife*, means here to inherit *from the wife as the stock of descent*. But the legitimate mode of interpreting an author certainly is to attend to the context, and to notice in what sense he himself uses the phrase in question on other occasions. If now we turn to the very next section of Littleton, we shall find the very same phrase made use of in a manner which clearly shows that Littleton did not mean, by inheriting as heir to a person, inheriting from that person as the stock of descent. For, after having thus laid down the law as to curtesy, Littleton continues: "And, also, in every case where a woman taketh a husband seised of such an estate in tenements, &c., so as, by possibility, it may happen that the wife may have issue by her husband, and that the same issue may, by possibility, inherit the same tenements *of such an estate as the husband hath, as heir to the husband*, of such tenements she shall have her dower, and *otherwise not*" (z). Now, nothing is clearer than that a wife was entitled to dower out of the lands of which her husband had only seisin in law (a); and nothing, also, is clearer than that a seisin in law only was insufficient to make the husband the stock of descent: for, for this purpose, an actual seisin was requisite, according to the rule "*seisina facit stipitem*." In this case, therefore, it is obvious that Littleton could

(u) Co. Litt. 29 a.

(z) Litt. s. 53.

(x) 2 Black. Com. 127.
Sect. 52.(a) Watk. Descents, 32 (42,
4th ed.).

not mean to say that the husband must have been *the stock of descent*, by virtue of having obtained an actual seisin: for that would have been to contradict the plainest rules of law. What, then, was his meaning? The subsequent part of the same section affords an explanation: "For, if tenements be given to a man and to the heirs which he shall beget of the body of his wife, in this case the wife hath nothing in the tenements, and the husband hath an estate tail as donee in special tail. Yet, if the husband die without issue, the same wife shall be endowed of the same tenements, because the issue, which she by possibility might have had by the same husband, might have inherited the same tenements. But, if the wife dieth leaving her husband, and after the husband taketh another wife and dieth, his second wife shall not be endowed in this case, *for the reason aforesaid*." This example shows what was Littleton's true meaning. He was not thinking, either in this section or the one next before it, of the husband or wife being the stock of descent, instead of some earlier ancestor. He was laying down a general rule, applicable to dower as well as to curtesy; namely, that if the issue that might have been born in the one case, or that were born in the other, of the surviving parent, could not, by possibility, inherit the estate of their deceased parent, by right of representation of such parent, then the surviving parent was not entitled to dower in the one case, or to curtesy in the other. It is plain that, in the example just adduced, the issue of the husband by his second marriage could not possibly inherit his estate, which was given to him and the heirs of his body by his first wife; the second wife, therefore, was excluded from dower out of this estate. And, in the parallel case of a gift to a woman and the heirs of her body by her first husband, it is indisputable that, for a precisely similar reason, her second husband could not claim his curtesy on having issue by her; for such issue could not possibly inherit their mother's estate. All that Littleton then intended to state with respect to curtesy, was the rule laid down by the Statute De Donis (b), which

(b) 13 Edw. I. c. 1.

provides that, where any person gives lands to a man and his wife and the heirs of their bodies, or where any person gives land in frankmarriage, the second husband of any such woman shall not have anything in the land so given, after the death of his wife, by the law of England, nor shall the issue of the second husband and wife succeed in the inheritance(c). When the two sections of Littleton are read consecutively, without the introduction of Lord Coke's commentary, their meaning is apparent; and the intervening commentary not only puts the reader on the wrong clue, but hinders the recovery of the right one, by removing to a distance the explanatory context.

If our construction of Littleton be the true one, it throws some light on the question discussed in Appendix (B), on the course of descent amongst coparceners. We there endeavoured to show that the issue of a coparcener always stood in the place of their parent, by right of representation, even where descent was traced from some more remote ancestor as the stock. Littleton, with this view of the subject in his mind, and never suspecting that any other could be entertained, might well speak generally of issue inheriting *as heir* to their parent, even though the share of the parent might have descended to the issue as heir to some more remote ancestor. The authorities adduced in Appendix (B) thus tend further to explain the language of Littleton; whilst the language of Littleton, as above explained, illustrates and confirms the authorities previously adduced.

Having at length arrived at the true principles of the old law, the application of them to the state of circumstances produced by the new law of inheritance will be very easy. A coparcener dies leaving a husband who has had issue by her, and leaving one or more sisters surviving her. The descent of her share is now traced from their common parent, the purchaser. But, in tracing this descent, we have seen in Appendix (B), that the issue of the deceased coparcener

(c) See Bac. Abr. tit. *Curtsey* of England (C), 1.

would inherit her entire share by representation of her. And the condition which will entitle her husband to curtesy out of her share appears to be, that his issue might possibly inherit the estate by right of representation of their deceased mother. This condition, therefore, is obviously fulfilled, and our conclusion consequently is, that the husband of a deceased coparcener, who has had issue by her, is entitled to curtesy out of the whole of her share. But in order to arrive at this conclusion, it seems that we must admit, first, that Lord Coke has endeavoured to support the law by one reason too many; and, secondly, that one laudatory flourish of Blackstone has been made without occasion.

APPENDIX (F).

Referred to, p. 324.

If the rule of perpetuity, which restrains executory interests within a life or lives in being and twenty-one years afterwards, be, as is sometimes contended (*a*), the only limit to the settlement of real estate by way of remainder, the following limitations would be clearly unobjectionable:—To the use of A., a living unmarried person, for life, with remainder to the use of his first son for life, with remainder to the use of the first son of such first son, born in the lifetime of A., or within twenty-one years after his decease, for life, with remainder to the use of the first and other sons of such first son of such first son of A., born in the lifetime of A., or within twenty-one years after his decease, successively in tail male, with remainder to the use of the first son of the first son of A., born in his lifetime, or within twenty-one years after his decease, in tail male, with remainder to the use of the second son of such first son of A., born in the lifetime of A., or within twenty-one years after his decease, for life, with remainder to the use of his first and other sons, born in the lifetime of A., or within twenty-one years after his decease, successively in tail male, with remainder to the use of the second son of the first son of A., born in his lifetime, or within twenty-one years after his decease, in tail male, with remainder to the use of the third son of such first son of A., born in the lifetime of A., or within twenty-one years after his decease, for life, with remainder to the use of his first and other sons, born as before, successively in tail male, with remainder to the use of such third son of the first son of A., born as before, in tail male, with like remainders to the use of the fourth and every other son of such first son of A., born as before, for

(*a*) Lewis on Perpetuity, p. 408 et

APPENDIX.

life respectively, followed by like remainders to the use of their respective first and other sons, born as before, successively in tail male, followed by like remainders to the use of themselves in tail male; with remainder to the use of the first son of A. in tail male; with remainder to the use of the second son of A. for life; with similar remainders to the use of his sons, and sons' sons, born as before; with remainder to the use of such second son of A. in tail male, and so on.

It is evident that every one of the estates here limited must necessarily arise within a life in being (namely, that of A.) and twenty-one years afterwards. And yet here is a settlement which will in all probability tie up the estate for three generations: for the eldest son of a man's eldest son is very frequently born in his lifetime, or, if not, will most probably be born within twenty-one years after his decease. And great grandchildren, though not often born in the lifetime of their great grandfather, are yet not unusually born within twenty-one years of his death. Now if a settlement such as this were legal, it would, we may fairly presume, have been adopted before now; for conveyancers are frequently instructed to draw settlements containing as strict an entail as possible; and the Court of Chancery has also sometimes had occasion to carry into effect executory trusts for making strict settlements. In these cases it would be the duty of the draftsman, or of the Court, to go to the limit of the law in fettering the property in question. But it may be safely asserted that in no single case has a settlement, such as the one suggested, been drawn by any conveyancer, much less sanctioned by the Court of Chancery or now by the Chancery Division of the High Court. The utmost that on these occasions is ever done is to give life estates to all living persons, with remainder to their first and other sons successively in tail male. As, therefore, the best evidence of a man's having had no lawful issue is that none of his family ever heard of any, so the best evidence that such a settlement is illegal is that no conveyancer ever heard of such a draft being drawn.

APPENDIX (G).

Referred to, pp. 439, 441.

THE Manor of \ A General Court Baron of John Freeman
 Fairfield in Esq. Lord of the said Manor holden in and
 the County of for the said manor on the 1st day of Janu-
 Middlesex. ary in the third year of the reign of our
 Sovereign Lady Queen Victoria by the Grace of God of
 the United Kingdom of Great Britain and Ireland Queen
 Defender of the Faith and in the year of our Lord 1840
 Before John Doe Steward of the said Manor.

At this Court comes A. B. one of the customary tenants of
 this manor and in consideration of the sum of £1000 of law- Considera-
 ful money of Great Britain to him in hand well and truly tion.
 paid by C. D. of Lincoln's Inn in the county of Middlesex
 Esq. in open Court surrenders into the hands of the lord of Surrender.
 this manor by the hands and acceptance of the said steward
 by the rod according to the custom of this manor All
 that messuage &c. [*here describe the premises*] with their Parcels.
 appurtenances (and to which same premises the said A. B.
 was admitted at the general Court holden for this manor
 on the 12th day of October 1838) And the reversion and
 reversions remainder and remainders rents issues and profits
 thereof And all the estate right title interest trust benefit
 property claim and demand whatsoever of the said A. B. in
 to or out of the same premises and every part thereof To
 the use of the said C. D. his heirs and assigns for ever
 according to the custom of this manor.

Now at this Court comes the said C. D. and prays to be Admittance.
 admitted to all and singular the said customary or copy-
 hold hereditaments and premises so surrendered to his use
 at this Court as aforesaid to whom the lord of this manor

Habendum. by the said steward grants seisin thereof by the rod To
HAVE AND TO HOLD the said messuage hereditaments and
premises with their appurtenances unto the said C. D. and
his heirs to be holden of the lord by copy of court roll at
the will of the lord according to the custom of this manor
by fealty suit of court and the ancient annual rent or rents
and other duties and services therefor due and of right
accustomed And so (saving the right of the lord) the said
C. D. is admitted tenant thereof and pays to the lord on
Fine £50. such his admittance a fine certain of £50 and his fealty is
respited.

(Signed) John Doe Steward.

INDEX.

A.

ABANDONMENT, evidence of, 557.

ABEYANCE, inheritance in, 315.

ABSTRACT of title, vendor bound to furnish an, 539.
now forty years sufficient, 540.

ACCOUNT current, stamps on mortgages to secure, 526, n.

ACCUMULATION, restriction on, 372.

ACKNOWLEDGMENT of deeds by married women, 279,
of right to production of documents, 561,
563.

ACTIONS, real and personal, 8.

ADMINISTRATOR, 11, 392.
of bare trustee, 141.

ADMITTANCE to copyholds, 421, 429, 440, 441, 443, 649.

ADVOWSON appendant, 378.
agreements for resignation, 396.
conveyance of, 398.
in gross, 378, 395, 397.
of rectories, 396.
of vicarages, 398.
proper length of title to, 539, 540.
limitation of actions and suits for, 552.

AGREEMENTS, what required to be in writing, 201.
county courts agreements for sale or lease, 203.
stamps on, 201, n.
for lease, 459.
stamps on, 459, n.

AGRICULTURAL Holdings (England) Act, 1883 . . 456, 482, 483—
486.

AIDS, 149, 152.

ALIEN, 87, 198.

- ALIENATION** of real estate, 23, 24, 59, 60, 62, 64, 66, 83, 85, 87, 89, 91, 99, 100, 103, 118, 119, 299.
 power of, unconnected with ownership, 349.
 of executory interest, 366.
 of copyholds, 426, 437, 439, 442, 649.
- AMBASSADORS**, children of, 88.
- ANCESTOR**, power of, over expectations of heirs, 62.
 descent to, 130, 138, 139.
 formerly excluded from descent, 131.
- ANCIENT** demesne, tenure of, 160, 419.
- ANNUITIES** for lives, enrolment of memorial of, now unnecessary, 383, 384.
 registration of, 384.
 search for, 566.
- ANTICIPATION**, clause against, 268, 269.
- APPENDANT** incorporeal hereditaments, 374, 376, 378.
 common appendant, 147, n., 555, 605, 616, 617, 625.
- APPLICATION** of purchase-money, necessity of seeing to the, 548.
- APPOINTMENT**, powers of, 244, 345, 349—See **POWERS**.
- APPORTIONMENT** of rent, 39, 40, 391, 468.
 of rent-charge, 391.
 by Land Commissioners, 391.
- APPURTENANCES**, 381.
- APPURTENANT** incorporeal hereditaments, 380, 554, 555, 574, 578.
 rights of common and of way, 380, 555, 574, 578, 618.
- ARMS**, grant of, 175, n.
 conditions for use of, 341.
- ARTS**, conveyance for promotion of, 99.
- ASSART**, 619.
- ASSETS**, 104.
 equitable, 105.
- ASSIGNEE** of lease liable to rent and covenants, 462, 463.
- ASSIGNMENT** of satisfied terms, 491—494.
 of lease, 472, 541, 544.
 of chattel interest must be by deed, 472.
 of underlease, 543, 544.
- ASSIGNS**, 87, 176.
- ASSURANCE**, further, 535, 537, 573, 577, 634.

- ATTAINDER** of tenant in tail, 80.
 of tenant in fee, 91, 156.
 abolition of, 30, 80, 91, 199.
- ATTENDANT** terms, 491—494.
- ATTESTATION** to deeds, 228, 346.
 to wills, 246, 248, 348, 442.
 to deeds exercising powers, 346, 347.
- ATTESTED** copies, 545, 560.
- ATTORNEYS'** and Solicitors' Acts, 238, 526—See stats. 33 & 34
 Vict. c. 28, and 44 & 45 Vict. c. 44.
- ATTORNMENT**, 296, 375.
 now abolished, 297, 376.
- AUCTION**, sale of land by, 202.
 opening of biddings abolished, 202.
- AUTRE droit**, estates in, 490.
- AUTRE vie**, estate pur, 25, 26, 54.
 quasi entail of, 82.
 in a rent-charge, 388, 389.
 in copyholds, 423.
- BANKRUPTCY**, 118, 429, 474.
 insolvent estate of deceased debtor may be ad-
 ministered in, 107, 142, 263.
 of tenant in tail, 81.
 of cestui que trust, 205.
 of tenant in fee simple, 120.
 of trustee, 205.
 search for, 567.
 exercise of powers in, 344.
 of owner of land subject to rent-charge, 392,
 393, n.
 power of trustee in, as to copyholds, 429.
 disclaimer of leaseholds by trustee in, 475.
 as to leaseholds in, , .
- BARE** trustee, 141, 199, n., 280, 441.
- BARGAIN** and sale, 219, 220, 223, 242, 461, 532, 628.
 required to be enrolled, 221, 221, n., 243.
 for a year, 221, 223, 628.
 of lands in Yorkshire, 243, 532.
- BASE** fee, 75, 79.
- BASTARDY**, 156.

BEDFORD Level registry, 233.

BENEFICE with cure of souls, 120.
sequestration of, 120.

BENEFICES upon the continent of Europe, 21, n.

BENEFICIAL owner, conveyance as, 241, 536, 576, 581.

BIDDINGS, opening of, abolished, 202.

BORDARII, 146.

BOROUGH-English, tenure of, 160.

BREACH of covenant, waiver of, 467.
actual waiver of, 467.
implied waiver, 467.
re-entry upon, 465—470.

BURGAGE, tenure in, 149.

BURGENSES, 148.

BURIAL grounds, vesting of property in, 207.
sites for, 99.

C.

CALVIN's case, 88.

CANAL shares, personal property, 9.

CERTIFICATE of official search of registers, &c., 118, 566.
of acknowledgment by married woman, 280.

CESSER of a term, proviso for, 487.

CESTUI que trust, 203, 205, 334.
difference between the rights of trustee and,
193, n.
is 1 at will, 455.
que vie, 26, 2

CHAMBERS, 18.

CHANCERY Amendment Act, 1858. .213.—See stat. 21 & 22 Vict.
c. 27.
ancient, 186, 194.
modern, 194.
interposition of, between mortgagor and mortgagee,
505.

CHANCERY Division, matters assigned to, 128, 193, 215, 505.

CHARITIES, incorporated, 101.

- CHARITY**, conveyance to, 92, 93, 95, 100.
 exemptions from Mortmain Act, 97.
 enrolment of, 92, n., 94, 97, n.
 new trustees of, 207.
 commissioners, 97.
 official trustee, 98.
 investment of funds, 101.
- CHATTELS**, 7, 8, 8, n., 9.
- CHELTENHAM**, manor of, 450.
- CODICIL**, 251.
- COLLATION**, 395.
- COMMISSIONERS**, Land, 169, 391.
- COMMON**, rights of, 376—378, 380, 555, 574, 605.
 of copyholds, 436.
 appendant, 555, 605, 610, 615, 616.
 commonable beasts, 614.
 no common for a house, 615.
 ancient meadow, 615.
 appendant need not be prescribed for, 616.
 shall be apportioned, 617.
 appurtenant is against common right, 618.
 writ of novel disseisin, 623.
 the remedy ascertained the right, 623.
 extinguishment of rights, 555, 625.
 fields, 378, 404, 618.
 metropolitan commons, 377.
 suburban commons, 378.
 in gross, 395, 555.
 limitation of rights of, 555, 626.
 tenants in, 167.
- COMMON forms**, 237, 239, 574.
- COMMON Law Procedure Act**, 1854..211, 211ⁿ. (c).—See stat.
 17 & 18 Vict. c. 125.
- COMMUNITY**, tribal, 404.
 village, 404.
- COMMUTATION** of tithes, 401.
 of manorial rights, 433.
- COMPANIES**, joint stock, 101.
- COMPENSATION** for improvements, 455, n., 482, 483.
 power to charge holding with repayment, 485.
- CONCEALED fraud**, limitation in cases of, 551.
- CONDITION** of re-entry for non-payment of rent, 294, 464.
 demand of rent formerly required, 294.

- CONDITION**, modern proceedings, 294.
 formerly inalienable, 296.
 severance of reversion, 464, 467.
 on breach of covenants, 465—470.
 effect of licence for breach of covenant, 465, 467.
 effect of waiver, 467.
- CONDITIONAL** gift, 59, 65, 119.
- CONSENT** of protector, 74.
 as to copyholds, 428, 444.
- CONSIDERATION**, 178, 188, 195, 224, 227, 572, 581, 628, 630, 649.
 on feoffment, 178, 187, 189, 192.
 a deed imports a, 179.
- CONSOLIDATION** of securities, 527—529.
- CONSTRUCTION** of wills, 25, 26, 254, 260.
 of law as to attendant terms, 494.
 of words, 17, 26.
- CONTINGENT** remainders, 311, 315, 371.
 anciently illegal, 312.
 Mr. Fearne's Treatise on, 316, n.
 definition of, 316.
 example of, 316, 320, 325, 366.
 rules for creation of, 318, 321.
 vesting of, 319, 321.
- CONTINGENT** Remainders Act, 1877.—See statute 40 & 41 Vict.
 c. 33.
 remainders, formerly inalienable, 326, 327.
 destruction of, 328.
 now indestructible, 328, 333, 334.
 trustees to preserve, 332, 333.
 of trust estates, 334, 371.
 difference between executory devises
 and, 365.
 of copyholds, 447.
- CONTINUING** breach of covenant, 467.
- CONTRACT** cannot bar estate tail, 78.
 special, 11
 where time not of essence, 202.
- CONVEYANCE**, fraudulent, 102.
 of advowson, 398.
 of tithes, 401.
 by tenant for life, 367.
 of land decreed to be sold or mortgaged to pay
 testator's debts, 47.
 voluntary, 102.
 by deed, 179, 180, 221, 288, 291.
 by married women, 280.

to uses, 224, 225, 226.
 form of a conveyance, 226, 240, 571.
 of land passes advantages not strictly appurtenant, 381, 574, 579.
 passes all the estate and interest of party conveying, 575.

CORVEYANCING and Law of Property Act, 1881, importance of this statute, 583.—See also Statute 44 & 45 Vict. c. 41. changes in the form of conveyance rendered possible by, 240, 574—583.

COPARCENERS, 128.
 descent amongst, 137, 591.

COPYHOLD Acts, 1852 and 1858 . . 435.

COPYHOLDS, definition of, 403.
 origin of, 403.
 growth of, the law of copyhold tenure, 408.
 Littleton's account of the tenure, 411.
 progress of development of copyholders' rights, 413.
 for lives, 413, 422.
 of inheritance, 412.
 history of, 403.
 estates in copyholds, 412, 417, 428.
 lease of, by licence of the lord, 419, n.
 exchange of freehold for copyhold, 377, n.
 estate *pua autrie vie*, 423.
 customary recovery, 427.
 forfeiture and re-grant, 427.
 equitable estate tail in, 445, 446.
 ancient state of copyholders, 417, 426.
 alienation of, 426, 437, 439—442, 649.
 subject to debts, 428.
 power of trustee in bankruptcy as to, 429.
 trustee in bankruptcy need not be admitted, 429.
 descent of, 430.
 tenure of, 430.
 commutation of manorial rights in, 433.
 enfranchisement of, 434, 435, 436.
 by tenant for life, 436.
 copyholds which are wife's separate property, 441, 450.
 mortgage of, 523.
 grant of, 438, 439.

COPYHOLDS, seizure of, 443.
 surrender of, 427, 437, 449, 649.
 admittance to, 421, 429, 439, 440, 441, 443, 538, 649.
 contingent remainders of, 447.
 deposit of copies of court roll, 515.
 abstract of title on purchase of, 540.
 sale of land formerly copyhold which has been enfranchised, 543.

INDEX.

CORPORATION, conveyance to, 100.

CORPOREAL hereditaments, 12, 17, 393.
now lie in grant, 393.

COSTS, mortgage to secure, 526.

COTARII, 146.

COUNTER-CLAIMS, 214.

COUNTERPART, stamp on, 181.

COUNTIES palatine, 114, 115.

COUNTY Courts, equity jurisdiction of, 195, 207, 509.
agreements for sale or lease, 203.

COURT of Judicature.—See SUPREME COURT OF JUDICATURE
ACTS.

COURT of Probate, 249.

COURT, suit of, 150, 152, 155, 157.
customary, 410, 437, 438.
rolls, 411, 438.
baron, 148.

COVENANT to stand seised, 243.

COVENANTS in a lease, 462.
run with the land, 463.
lessor's, 464.
re-entry on breach of, 465, 469.
effect of license for breach of, 465, 466.
waiver of breach of, 467.
for quiet enjoyment, implied by certain words, 532.
for title, 240, 533, 535—539, 572, 682.
statutory covenants for title, 240, 536—539, 580.
heirs now bound by covenant, 104, 534.
now implied by statute in certain cases, 536, 575.
cases in which covenants for title are not now im-
plied, 538.
benefit of implied covenant to run with the land,
538.
implied by statute may be varied by deed, 539.
to produce title deeds, 560, 561.

COVERTURE, 266, 550.

CREDITORS, conveyances to defraud, 102.
judgment, 107, 110.—See JUDGMENT DEBTS.
may witness a will, 249.
sale of copphold estates for benefit of, 429.

CROWN debts, 81, 115, 203, 428.—See **DEBTS**.
 registration of, 116, 117.
 search for, 117, 566.
 forfeiture to the, 80, 91, 156, 198, 199.
 limitation of rights of, 549.

CURTESY, tenant by, 274, 275, n., 276, n., 277,
 of gavelkind lands, 159, n., 275.
 as affected by the new law of inheritance, 276, n.,
 of copyholds, 436, 450.

CUSTODY of documents, undertaking for safe, 564.

CUSTOMARY court, 410, 437.
 freeholds, 408, n., 409, 419, 422.
 recovery, 427.

CUSTOMS, 364, 625, 626.

CY præs, doctrine of, 325.

D.

DAUGHTERS, descent to, 127, 137, 591.

DEATH, civil, 29.
 gift by will in case of, without issue, 256.

DEBTS, crown, 81, 115, 203, 428, 566.
 where trustees and executors may sell or mortgage to
 pay, 261, 262.
 devisee in fee or in tail charged with, 262.
 of deceased traders, 105.
 judgment, 81, 107, 110, 112, 114, 204, 428, 473, 566.
 liability of lands to, 103, 104, 106, 367.
 of leaseholds to, 473.
 insolvent estates of deceased debtor may be administered
 in bankruptcy, 107, 142, 263.
 simple contract, 106, 115, n.
 charge of, by will, 106, 261, 263.
 creditors who now stand in equal degree, 107.
 sale or mortgage for payment of, 367.
 copyholds now liable to, 428.
 liability of trust estates to, 203.

DECLARATION of title, act for, 567.

DEED, 179, 472.
 of grant, 217, 242, 571, 581.
 alteration, rasure or addition in, 180, 180, n.
 whether signing necessary to, 183.
 poll, 181, 182.
 required to transfer incorporeal hereditaments, 288.
 on grant of rent-charge, 383.
 of grant, conveyance of reversion by, 291.

- DEEDS**, stamps on, 181.
 similarity of, 234.
 enrolment of, 565.
 undertaking for safe custody of, 565.
 grant of, 573, n., 632. See **TITLE DEEDS**.
- DEMAND** for rent, 294.
- DEMANDANT**, 69.
- DEMESNE**, the lord's, 160, 419.
- DEMISE**, implies a covenant for quiet enjoyment, 532.
- DENIZEN**, 88.
- DESCENT**, 11.
 of an estate in fee simple, 125—142, 585, 591, 636.
 of an estate tail, 80, 82, 130.
 of estate of mortgagee, 142, 263, 507.
 of estate of trustee, 142, 165, 199, 263.
 gradual progress of the law of, 122.
 of gavelkind lands, 158.
 of borough English lands, 160.
 of an equitable estate, 200.
 of tithes, 401.
 of incorporeal hereditaments, 394.
 of copyholds, 430, 585.
- DESTRUCTION** of entails, 66.
- DEVISE**.—See **WILL**.
- DISABILITIES**, time allowed for, 550, 556.
- DISCLAIMER**, 122, 259, 361, 393, 475.
- DISTRESS**, 293, 485, 613.
 clause of, 386.
 statutory powers of distress, 387.
 for rent reserved by underlease, 477.
- DOCKETS**, 109.
- DOMESDAY SURVEY**, 145.
- DOMINANT** tenement, 555.
- DONATIVE** advowsons, 395.
- DOWER** in tail, 58.
- DOUBTS**, legal, 184.
 281, 282.
 action for, 287.
 recovery of widower's dower by bill in equity, 287.
 of gavelkind lands, 283.
 under old law independent of husband's debts, 282

DOWER, old method of barring, 283.
 under the Dower Act, 285, 285, n.
 declaration against, 286.
 modern method of barring,
 uses to bar, 353, 632.
 of copyholds, 436, 451.
 formerly defeated by assignment of attendant term, 493.
 leases, by tenant in, 21

DRAINING, 40, 41, 43, n., 377.

DUPLICATE deed, stamp on, 181.

E.

EASEMENTS, 574.

 grant of, by general words, 381, n., 578.
 limitation of right to, 555.

EDUCATIONAL association, conveyance to, 99.
 incorporation to trustees, 101.
 new trustees, 207.

EJECTMENT, action of, 415, n.
 "John Doe," 415, n.
 of mortgagor by mortgagee, 504.

ELEGIT, writ of, 108, 112, 428.

EMBLEMENTS, 38, 455.

ENCLOSURE—See **INCLOSURE**.

ENDOWED schools, 98.

ENFRANCHISEMENT of copyholds, 434.
 by agreement, 436.

ENROLMENT.—See **INROLMENT**.

ENTAIL.—See **TAIL**.

ENTIRETIES, husband and wife take by, 273.

ENTIRETY, 129.

ENTRY, necessary to a lease, 217, 218, 460.
 tenant's position altered by, 217.
 right of, supported a contingent remainder, 329.
 on court roll of deed, barring estate tail, must be made
 within six months, 445, n.
 power of, to secure a rent-charge, 396.
 statutory powers of entry, &c., 445

- EQUITABLE** assets, 104.
 estate, 193—197, 215, 334, 386, 519.
 formerly no escheat of, 198.
 forfeiture of, 199.
 creation and transfer of, 200.
 descent of, 200.
 tenant for life, 201.
- ERUITABLE** estate liable to debts, 203.
 tail in lands to be purchased, 196.
 tail in copyhold may be barred by deed, 445.
 in mortgaged lands, 519.
 surrender of, 445.
 of alien, 198.
 of wife, 267.
 curtesy of, 275.
 relief, 213, 214.
 waste, 33.
- EQUITABLE RIGHTS**, 194, n.
- EQUITIES**, incidental, 214.
- EQUISY**, rules of, now to prevail, 191, 192.
 follows the law, 195.†
 a distinct system, 211.
 of redemption, 506, 527, n.
 is an equitable estate, 193, 519.
 mortgage of, 522, 528, 529.
- ERASURE**, 180.
- ESCHEAT**, 155, 157, 157, n.
 formerly none of trust estates, 198.
 law of escheat now applies, 198.
 none of a rent-charge, 394.
 of copyholds, 430.
- ESCROW**, 180.
- ESCUAGE**, 152.
- ESSARTS**, 619.
- ESSATE** during hood, 29.
 legal, 192. (hood, 29.
 pur autre vie, 25, 26, 089, 423.
 in autre droit, 490.
 leases and sales of settled, 31, 48, 55.
 grant of, 59, 572, 579.
 tail, 57, 58, 65, 72, 74, 130, 175, 196, 253, 257, 258, 307,
 370, 429, 595.
 for life, 20, 21, 25, 28, 29, 73, 175, 196, 255, 388.
 for life in copyholds, 423.
 in fee simple, 175, 389.
 in fee simple in copyholds, 428, 430.
 ancient incidents of tenure, 511, 605.

ESTATE no escheat of trust, 198.
 forfeiture of trust, 199.
 of life, 177, 329.
 creation and transfer of trust,
 must be marked out, 224.
 of wife, 269.
 particular, 290.
 one person may have more than one, 302.
 words of limitation, 174, 175, 241, 304.
 in remainder, 305, 307.
 where the first estate is an estate tail, 308.
 estate arising by force of statute on execution of statu-
 tory power, 367.
 in copyhold, 378, 412, 417.
 sale of, by trustee in bankruptcy, 429.
 at will, 417.
 equitable, 194—197, 215, 334, 396, 519.—See **EQUIT-
 ABLE ESTATE.**
 clause, 228, 240, 572, 579, 631, 649.

ESTOPPEL, lease by, 461.

EXCHANGE, by tenant in tail, 80.
 implied effect of the word, 532.
 power of, 356, 358.
 of freehold for copyhold, 377, n.
 statutory provision for, 377, n.

EXECUTION of a deed, 179, 346, 347.

EXECUTORS, directions to, to sell land, 362, 363.
 devise of real estate independent of assent of, 261.
 where they may sell or mortgage to pay debts, 262.
 take an interest in real estate vested in a sole
 trustee or mortgagee, 263.
 power to convey real estate contracted to be sold,
 263.
 exoneration of, from liability to pay rent-charges,
 392.
 exoneration of, from rents and covenants in leases,
 473.

EXECUTORY devices.—See **EXECUTORY INTEREST.**
 devise, difference between contingent remainder
 and, 365.
 validity of a limitation as an, 370,

EXECUTORY interest, 312, 321, 338, 364, 368, 447.
 creation of, under Statute of Uses, 339.
 by will, 361.
 alienation of, 366.
 limit to creation, 369.
 executory limitations to take effect on
 failure of issue, 370.
 in copyholds, 448.
 where preceded by estate tail, 370.

EXPRESS power of leasing, 34, 356.

EXPRESS trust, limitation in cases of, 550, 554.

F.

FARMING LEASES, 10.

FATHER, descent to, 132, 138.

his power to appoint a guardian, 153.

FEALTY, 150, 152, 155, 157, 292, 430.

FEE, meaning of term, 65.

simple, 83, 86, 143, 175.

words *in fee simple* may be used in a deed, 175, 422, 581.

simple, alienation by tenant in fee.—See **ALIENATION**.

joint tenants in, 163.

equitable estate in, 197.

gift of, by will, 255, 257.

FEE simple, estate of, in a rent-charge, 389.

customary estate in, 419, 428.

enlargement of long term into fee simple, 496, 497.

See also **TERM**.

FEE farm rent, 471, n.

tail, 65, 175.

FEME Covert.—See **MARRIED WOMAN**; **WIFE**.

FEOFFMENT, 61, n., 171, 177, 185, 189, 291.

to the use of feoffor, 187.

forfeiture by, 177.

deed required for, 183.

by idiots and lunatics, 177.

by infants of gavelkind lands, 177.

by tenant for life, 177.

writing formerly unnecessary to a, 178.

FEUDAL system, introduction of, 3, 5, n., 22, n., 28, 144.

abolition of, 7, 86.

feuds originally for life, 21, 303.

feudal system of land holding upon the continent of Europe, 21, n.

tenancies become hereditary, 22, n., 58.

grantee of feudal estate regarded as taking only a personal interest, 303.

FEUDAM novum ut antiquum, 131.

FIELDS, common, 378, 404.

INDEX.

- FINE**, 70, 71, 278, 489.
 fines on leases, 37.
 formerly used to convey wife's lands, 278.
 attornment could be compelled on conveyance by, 297.
 payable to lord of copyholds, 422, 650.
- FINES**, search for, 563.
- FIRE**, insurance of improvements, 45.
 relief against forfeiture for non-insurance, 469.
 power to insure against, in mortgages,
- FIXTURES** on agricultural and pastoral holdings, 463, 482, n., 486.
- FORECLOSURE**, 508, 553.
 court may direct sale of property instead of, 509.
 assigned to Chancery Division, 506.
- FORESHORE**, 379, 380.
- FORFEITURE** by feoffment, 177.
 and re-grant of copyholds, 427.
 for treason, 80, 91, 156, 156, n., 199, 427.
 abolition of, 30, 80, 91, 156, 199, 430.
 on breach of covenants, 465, 469—472.
- FORM** of a conveyance, 226, 571, 581.
- FORMEDON**, 67.
- FRANKALMOIGN**, 60, 161.
- FRANKMARRIAGE**, 60.
- FRAUD**, concealed, limitation in cases of, 551.
- FRAUDS**, Statute of (see also statute 29 Car. II. c. 3), 26, 183, 200, 203, 204, 249, 293, 457, 458, 472, 515.
- FREEBENCH**, 436, 450.
- FREEHOLD**, 28, 58, 83, 86, 148, 541.
 customary freeholds, 419, 420, 422, 425.
 exchange of freehold for copyhold, 377, n.
 any estate of, is larger than estate for term of years, 488.
- FREEMEN**, 151, 613.

G.

- GAIN**, 612.
- GARDENS** for the poor, 378.
- GAVELKIND**, 158, 177.
 curtesy of gavelkind lands, 159, n., 275.
 dower of gavelkind lands, 283.

INDEX.

- GENERAL** occupant, 26.
residuary devisee, 252.
registry, 559, 568.
words, 228, 240, 572, 578, 628, 631.
- GESTATION**, period of, included in time allowed by rule of perpetuity, 73, n., 369.
- GIFT**, conditional, 59, 65, 119.
in tail, 143, 257, 258.
in fee, 143, 257, 258.
to use of feoffee, 178.
with livery of seisin, 173, 186.
to husband and wife and a third person, 272.
their heirs, 272.
- GIVE**, word used in a feoffment, 174.
warranty formerly implied bys 530, 532.
- GLAMORGAN**, county of, 624.
- GOODS**, 7, 8, n., 9.
- GRAND** serjeanty, 158.
- GRANT**, deed of, 217, 242, 291, 292, 301, 421, n., 571, 581.
an innocent conveyance, 242.
construed most strongly against grantor, 24.
incorporeal hereditaments lay in, 288, 374, 380.
proper operative word for a deed of grant, 242.
of easement, 377, n., 578.
of copyholds, 438, 439.
implied effect of the word, 242, 532.
- GROSS**, incorporeal hereditaments in, 378, 554.
seignory in, 382.
common in, 395, 555.
advowson in, 378, 395, 397.
prescription for exercise of rights in, 554.
- GUARDIAN**, 153.

H.

- HABENDUM**, 228, 234, 235, 572, 582, 629, 632, 650.
- HALF-BLOOD**, descent to, 134, 139, 586.
- HEIR**, anciently took entirely from grantor, 24.
alienation as against, 59.
power of ancestor over expectations of heirs, absolute, 62.
is appointed by the law, 87, 121.
bound by specialty, 104, 534.
at law, 121.
expectant, 59, 64.
apparent, 121.

presumptive, 121.
 cannot disclaim, 122.
 word "heirs" used in conveyance of estate of inheritance,
 175.
 is a word of limitation, 176, 304.
 devise to, 260.
 contingent remainder to, 307, 310, 314.
 gift to "heirs," 314.

HEREDITAMENTS, 6, 9.
 corporeal, 12, n., 17.
 incorporeal, 12, n., 18, 288, 374, 393.

HERIOTS, 431, 436.
 heriot service, 432, n.
 custom, 433, n.

HIDES and yard lands, 611.

HIGH COURT of Justice, 115, 168, 169, 190.
 enrolment of deeds in, 565.

HIGH treason, 80, 91, 136, 430.

HOMAGE, 149, 437.

HONOUR, titles of, 9, 402.

HOUSES in boroughs, 148.

HULL registry, 231.

HUSBAND, right of, in his wife's lands, 121, 266, 277, 449, 479.
 present powers of, 277.
 Married Women's Property Act, 1882. .266, 270, 449,
 480.
 and wife one person, 272.
 could not convey to his wife, 273.
 unless by Statute of
 Uses, 273.
 holding over, is a trespasser, 277.
 appointment by, to his wife, 349.

I.

IDIOTS, 89, 177, 443, 556.

IMMOVEABLE property, 2, 6.

IMPLICATION, gifts in a will by, 257.

IMPROVEMENTS, 40, 41, 43, 95, 455, n., 482, 485.
 under Settled Land Act, 1882. .43—46.
 enumeration of, under the Act, 43, 44, nn.

INCLOSURE, 44, n., 376, 377.

conveyance of, will carry adjoining waste, 379.

Commissioners, 377.

partition by, .

INCORPORATED charities, 101.

INCORPOREAL property, 12, 13, 288, 374, 393.

not subject to tenure, 394.

INCUMBRANCES, searches for, 524, n., 565, 566.

money sufficient to provide for, may now be paid into Court, 547.

covenant that estate is free from, 535, 537, 573, 576, 633.

INDENTURE, 181.

INDESTRUCTIBILITY of land, 1.

INDUCTION, 395.

INFANTS, 89, 177, 364, 443, 556.

tenant for life, 54.

leasing and sale of infant's land, 91.

management of land during minority, 154, n.

marriage settlements, 89, 350.

INHERITANCE, law of.—See **DESCENT**.

trust of terms to attend the, 491, 492.

owner of, subject to attendant term, had a real estate in equity, 494.

INJUNCTION, 31, 212, 214.

INNOCENT conveyance, 242.

INROLMENT of deeds barring estate tail, 70, n., 72, 74, 445, 565.

of conveyance for charitable uses, 92, 92, n., 97, n.

of separate deed of trust, 94.

of bargain and sale, 221, 243.

of memorial of deeds as to lands in Middlesex and Yorkshire, 231, 243, 565.

of wills in Middlesex and Yorkshire, 264.

of memorial of annuities for lives, 383, 566.

of deeds in the inrolment department of the central office of the High Court of Justice, 565, 566, n.

INSOLVENCY, 118, 567.

insolvent estate of deceased debtor may be administered in bankruptcy, 107.

INSTITUTION, 395.

INSURANCE, relief against forfeiture for non-insurance, 469.

of improvements, 45.

INTENTION, rule as to observing, in wills, 254, 257.

INTERESSE termini, 461.

INTEREST, stipulation to raise, void, 516.
 stipulation to diminish, good, 516.
 former highest legal rate of, 516.

INTESTACY, 11, 12, n., 27, 894, 520.
 of a bare trustee, 141.
 registration in Yorkshire of affidavit of, 265.

INVESTMENT of charity funds, 101.
 of capital money arising out of Settled Land Act,
 1882 . . 49—52.

IRELAND, leases by tenant for life in, 34, 35.

ISSUE, in tail, bar of, 70, 75, 76.
 devise to, of testator, 253.
 devise in case of death without, 256.
 executory limitations to take effect in failure of, 370.

J.

JOINT stock companies, 101.

JOINT tenants for life, 162.
 in tail, 162.
 in fee simple, 163.
 of copyholds, 433.
 trustees made, 164, 199.
 release by, 166.
 tenancy, severance of, 166.
 estate, no curtesy of, 275.
 no dower of, 283, 284.

JOINTURE, 284.
 equitable, 285.

JUDGMENT debts, 81, 107, 110, 204.
 lien of, now abolished, 112.
 in counties palatine, 114.
 registry of, 111, 565, 566.
 as to trust estates, 204.
 as to powers, 344.
 as to copyholds, 438.
 search for, 112, 117, 566.
 as to leaseholds, 473.
 limitation of actions on, 552.
 against a mortgagee, 518.

JUDICATURE.—See **SUPREME COURT OF JUDICATURE ACTS**.

K.

KNIGHT's service, 149, 152.

L.

LAND, indestructibility of, 1, 7.
 term, 8 n., 18, 540, 377, 614.
 action for recovery of, 416.
 Transfer Act, 568.
 means arable land, 614.

LAND Commissioners for England, 169.
 partition by, 169.
 appointment of rent-charge
 by, 391.

LANDLORD, trustee, 485.

LANDS, liability of, for debts, 103, 106, 110.

LAPSE, 253.

LAW and equity, distinct systems, 211, 455.
 to be administered concurrently, 213—215.

LEASE, agreements for, 459.
 stamp duty on agreements for, 459, n.
 from year to year, 456, 457.
 assignment of interest by tenant from year to year, 456, n.
 for a term of years, 11, 454.
 for a number of years, 143, 217, 458, 460.
 for years is personal property, and why, 10, 11.
 for life, 143.
 entry, necessary, 217, 460.
 by tenant in tail, 78, 79, 80.
 of infant's land, 91.
 by tenant in dower, 286.
 for a year, 628.
 abolished, 223.
 leases in writing to be by deed, 458.
 no formal words required in a, 458.
 leases made after 31st December, 1881 . . 463, 468.
 by tenant for life, 33, 355, n., 356.
 by husband of wife's lands, 277.
 power to, 34, 354, 355, 503, 504.
 express power to lease, 34, 356.
 statutory powers to lease, 34.
 by authority of the Court, 34.
 under Settled Land Act, 1889 . . 35.
 fines on leases, 37.
 lease for confirming a previous lease, void or voidable, 38.
 by copyholder, 418.
 lease of copyholds by licence of the lord, 419, n.
 stamps on, 459, n.
 by estoppel, 461.
 rent reserved by, 292—296, 462—464.
 condition of re-entry in, 294, 464—470.
 mortgagor could not make a valid, 502.

LEASE, forfeiture of, 156, n. (d).

LEASE and release. 216, 217, 222, 242, 242, 629.
an innocent conveyance, 242.

LEASEHOLDS, will of, 472.
mortgage of, 513.
disclaimer of, by trustee in bankruptcy, 475.
purchaser of, formerly entitled to a sixty years' title, 640.
cannot now require lessor's title, 641.
sale of, 544.

LEGACIES, limitation of suits for, 552, 554.
charge of, 262.

LEGAL doubts, 184.
estate, 192, 215, 386, 502.
instruments, formal style of, 233, 239.
memory, 554.
rights to be recognized, 194, n., 214.

LESSOR'S title cannot now be required, 641.

LIBER Sochemannus, 146.

LIBERUM tenementum, 28.

LICENCE, effect of licence for breach of covenants in a lease, 465.
restrictions on effect of, 466.
to demise copyholds, 419, n.

LIEN of vendor, 515, 521.

LIFE annuities, 383, 384, 566.
estate for, 20, 21, 25, 28, 47, 175, 256, 301, 304.
joint tenants for, 162.
equitable estate for, 196.
tenant for, concurrence of, to bar entail, 74, 76.
estate for, in a rent-charge, 388.
estate for, in copyholds, 422.
tenant for, entitled to custody of title-deeds, 558.
forfeiture of life estate, 177, 329.

LIGHT, limitation of right to, 556.
right to, passing by conveyance, 574.

LIMITATION of estates, 174, 224, 321, 364, 365, 369, 647.
of a vested remainder after a life estate, 301.
words of, 174, 175, 176, 241, 304.
statutes of, 549, 553, 554, 555.

LIMITED Owners' Residences Acts, 42.

LIS pendens, 117.
arch for, 118.

LITERARY institutions, 99, 207.
incorporation of trustees, 101.

LIVERY in deed, 173.
in law, 174.
of wardship, 149.
of seisin, 171, 173, 174, 183, 186.
corporeal hereditaments formerly lay in, 288.

LOANS, 9.

LODGERS' Goods Protection Act, 294, n.

LOGIC, scholastic, 199, 322.

LONDON, custom of, 85, 86.

LORD's demesne, 146.

LOT mead, 615.

LOTS, sale of property in, 545.

LUNATIC, 89, 177, 443, 537, 538, 556.

M.

MAINE, Sir Henry, on primogeniture, 619.

MALES preferred in descent, 127, 132, 133.

MANDAMUS, 212, 215.

MANERIA, 146, 405.

MANORS, 147, 160, n., 418, 426.
lord's demesne, 146.
rights of lords of, to wastes by side of commons, 379.
commutation of manorial rights, 433.
common appendant, 605.

MARRIAGE, 149, 250.
settlements, 89, 333, 356, 357.

woman, separate property of, 120, 267, 268, 450.
before 1883, had no disposing power, 91, 120, 266.
Married Women's Property Acts, 266, 270, 449, 480.
capable of holding property as a feme sole, 270.
property of woman married after the Act to be held by her as a feme sole, 270.
property acquired after the Act by a woman married before the Act to be held by her as a feme sole, 271.
saving of existing settlements, 271.

- MARRIED woman, conveyance of her lands, 279, 280.**
 bare trustee, 280, 441.
 surrender of her copyhold lands, 441, 446.
 copyholds which are wife's separate property,
 441.
 rights of, in her husband's lands, 121, 284.
 rights of, in her husband's copyholds, 449,
 450.
 admittance of, to copyholds, 443.
 husband's rights in her term, 479.
 appointment by, 349.
 release of powers by, 361, 361, n.
 release of her right to dower, 282.
- MATERNAL ancestors, descent to, 132, 140.**
- MEADOWS, 30, 611, 615.**
- MEMORY, legal, 554.**
- MEN, means tenants, 614.**
- MERCHETUM, 407.**
- none of tithes in the land, 402.
 of tithe rent-charge, 402.
 of a term of years in a freehold, 488, 489.
 none of estates held in autre droit, 490.
- MERTON, Statute of, 6, 613.**
- MESSAGE, term, 17.**
- MIDDLESEX registry, 231, 264, 565.**
 devise of lands in, 264.
 age of land in, 523.
- MINES, 18, 31, 103, 498.**
 lease of, 35.
 rent on mining lease, 37.
 sale under powers reserving, 35
 right of the lord of copyholds to, 418,
- MODUS decimandi, 552, n., 625.**
- MONEY land, 196, 197.**
- MORTGAGE, 452, 499.**
 construction of, in law, 501.
 for payment of debts, 262, 367, 525.
 legacies, 262, 263.
 stamps on, 500, n., 519, n.
 origin of term, 502.
 legal estate in, 502.
 to trustees, 517.

- MORTGAGE**, equity of redemption of, 506, 522, 529.
 surrender of mortgaged estate, 507, n.
 foreclosure of, 508, 509, 510, 553.
 power of sale in, 510, 511.
 statutory power of sale in, 510.
 appointment of receiver in, 510.
 fire insurance in, 510.
 repayment of, 511.
 of copyholds, 513.
 of leaseholds, 513, 537.
 by underlease, 514.
 by deposit of title deeds, 514, 524, n.
 interest on, 516.
 to joint mortgagees, 517, 518.
 now primarily payable out of mortgaged lands, 520.
 30 & 31 Vict. c. 69... 521.
 40 & 41 Vict. c. 34... 521.
 tacking, 523, 529.
 land in Middlesex and Yorkshire, 523.
 for future debts and advances, 525, 526.
 to secure an account current, 526, n.
 for future costs, 526.
 for long term of years, 512.
 transfer of, 519.
 effect of two mortgages by same person, 527.
 consolidation, 527—529.
 covenants for title on, 536, 537, 581, n.
- MORTGAGEE** and mortgagor, relative rights of, 502—505.
 descent of estate of, 142, 263, 507, 507, n.
 powers of mortgagee where mortgage made by deed
 after 31st December, 1881... 510.
 judgment against, 518.
 may sue in his own name, 505.
 may be compelled to transfer, 519.
 in possession, 504, 551.
 right to recover possession, 553.
 power to lease, 504.
 deeds in possession of, 557, 559, 560.
- MORTGAGOR**, could not make a valid lease, 502.
 except under express power of leasing, 503.
 statutory power to lease, 503.
 covenants for title by a, 535, 536, 581, n.
 limitation of his rights to redeem, 551.
 must give notice of intention to repay mortgage
 money, 512.
 inspection of deeds in possession of mortgagee,
 459, 460.
- MORTMAIN**, 66, 91, 93, 95, 96, 97, 101.
 exemptions from Mortmain Act, 97.
- MOTHER**, descent to, 139, 140.

MOVABLES, 1, 2, 6.

MULTIPLICITY of suits, 214.

1. public conveyance of land for, 100.

N.

NAME, directions to assume, 341.

NATURAL life, 29.

NATURALIZATION, 87, 89.

Act of 1870 . . 87, 89, 198.

NEW river shares, 9, n.

NEW trustees, 206--208.

statutory power to appoint, 208, 209.

vesting of trust estate in new trustee, 206, 210.

stamps on appointment of, 211.

NEXT presentation, 399.

NORMAN Conquest, 2.

NOTICE of sale by tenant for life, 52.

of a trust, 193, n.

of rent-charge, 384, n.

of an incumbrance, 111, 493, 523.

of unregistered assurance, 232.

for repayment of mortgage money, 512.

to quit, 456.

NOVEL disseisin of common of pasture, writ of, 623.

O.

OCCUPANT, 26.

of a rent-charge, 389.

OFFICES, 402.

OFFICIAL searches of registers, &c., 566.

OPERATIVE words, 228, 234, 572, 581, 630.

ORDER for sale by Chancery Division, 113.

OUTLAWRY, 29.

OWNERSHIP, no absolute ownership of real property, 21.

OXGANGS, 612.

P.

- PALATINE**, judgments in counties, 114, 115.
- PARAMOUNT**, Queen is lady, 3, 144.
- PARCELS**, 228, 234, 572, 582, 628, 631, 649.
- PARKS**, public, conveyance for, 100.
- PARTICULAR** estate, 290.
- PARTIES** to a deed, 227, 234, 546, 571, 581, 628, 629.
 person taking benefit need not be a party, 182.
- PARTITION**, 128, 168, 169, 377, n., 532.
 31 & 32 Vict. c. 40, and 39 & 40 Vict. c. 17.. 169.
 of copyholds, 433.
- PASTORAL** holdings, 457.
- PATERNAL** ancestors, descent to, 132, 133, 138, 139.
- PATRON** of a living, 395.
- PERPETUITY**, 73, 323, 370, 372, 647.
- PERSONAL** property, 8, 9, 452.
 corporeal and incorporeal, 12, n.
 classification of property as real or personal,
 14, n.
 rules of descent do not apply to, 141.
- PETIT** serjeanty, 158.
- PLAY** grounds, 99.
- PLOUGHLANDS**, 612.
- POND**, description of, 18.
- PORTIONS**, terms of years used for securing, 488.
- POSSESSION**, mortgagee in, 504, 551.
 mortgagee's right to recover possession, 553.
- POSSIBILITY**, alienation of, 326, 327.
 of issue extinct, tenant in tail after, 76.
 on a possibility, 321.
 common and double, 322, 323.
- POSTHUMOUS** children, 318.
- POWER**, 343, 349, 350.
 vested in bankrupt or insolvent, 344.
 compliance with formalities of, 345.
 attestation of deed executing, 346.
 equitable relief on defective execution of, 347.

- POWER**, exercise of, by deed, 345, 349.
 exercise of, by will, 348, 349.
 extinguishment of, 351, 360.
 suspension of, 351.
 special, 353.
 of leasing, 354.
 express power, 34, 356.
 statutory powers, 34.
 under Settled Land Act, 1882 . . 35.
 in mortgages, 503, 504.
 ignorance of legal rules, 350.
 estates under, how they take effect, 359.
 release of, 361.
 disclaimer of, 361.
 of sale in mortgages, 510, 511.
 of sale and exchange in settlements, 356, 358.
- PRÆCIFE**, tenant to the, 69.
- PREDECESSOR**, 336.
- PREMISES**, term, 18.
- PRESCRIPTION**, 380, 554, 555.
- PRESENTATION**, 3
 next, 399.
 sale or assignment of, by spiritual person, when
 void, 399.
- PRESENTMENT** of surrender of copyholds, 440.
 of will of copyholds, 442.
- PRIMOGENITURE**, 72, 127.
 Sir Henry Maine on, 619.
- PRIVITY** between lessor and assignee of term,
 none between lessor and under-leasee, 478.
- PROBATE**, Court of, 249.
- PROCLAMATIONS** of fine, 71.
- PRODUCTION** of documents, 543, 559, 560.
 acknowledgment of right to, 561.
- PROFESSED** persons, 21
- PROFESSIONAL** remuneration, 235, 236, n., 238, 526.
- PROFIT à prendre**, 555.
- PROPERTY**, classification of, as real or personal, 14, n.
 different meanings of the word, 14, n.
- PROTECTOR** of settlement, 74, 75, 428, 445.
- PUR autre vie**, estate, 25, 26, 54, 82, 359, 423.

- PURCHASE**, meaning of term, 125.
 when heir takes by, 260.
 deed, specimen of a, 227.
 deed, stamps on, 229, 230.
 money, application of, 548.
- PURCHASER**, voluntary conveyances void as to, 102.
 judgments formerly binding on, 109, 117.
 with notice of unregistered assurance, 232.
 protection of, without notice, 111, 429, 492, 493.
 descent traced from the last, 125, 585.
 conveyance to the use of, 224.
 relief against mistaken payment by, 357.
 what expenses to be borne by, 544.
 rights of, on an open contract, 539—546.
 rights of, in case of action for specific performance, 545.

Q.

- QUASI** entail, 82.
- QUEEN** is lady paramount, 3, 144.
- QUIA** emptores, Statute of (see statute 18 Edw. I. c. 1).
- QUIET** enjoyment, covenant for, 532, 533, 534, 572, 576, 633.
- QUIT** rent, 154, 157.

R.

- RACK-RENT**, enactment as to tenants at, 38.
- RAILWAY** Rolling Stock Protection Act, 294, n.
 shares, personal property, 9.
- REAL** property, 8, 9, 11.
 classification of property, as real or personal, 14, n.
 act to amend the law of, 217, 224, 293, 298, 327, 331, 533.
- RECEIPT** clause, 548.
 of trustees now discharges, 548.
 for purchase-money, form of, 229, 572, 581, 630, 635.
- RECEIVER**, power to appoint in a mortgage, 511.
- RECITAL** of contract for sale, 227, 571, n., 630.
 of conveyance to vendor, 227, 234, 571, n., 630.
- RECITALS** in deeds, 541, 571, n.
- RECOGNIZANCES**, 113.

- RECOVERIES**, search for, 565.
- RECOVERY**, 67, 68, 69, 70.
 customary, 427.
- RECREATION** grounds, 378.
- RECTORIES**, advowsons of, 396.
- REDDENDUM**, 629.
- REDEMPTION**, equity of, 506, 527, n., 528.
 action for, 509.
- RE-ENTRY**, condition of, 294, 295, 296, 464—470, 498.
 not now destroyed by licence for breach of covenant, 466.
 not now destroyed by waiver of breach of covenant, 467.
- REGISTER** of judgments, 109, 111, 565, 566.
 of writ of elegit, 111, 112, 113, 114.
 of crown debts, 116, 566.
 of lis pendens, 117.
 of deeds, 231, 557, 565, 566.
 notice of unregistered assurance, 232.
 registration in Yorkshire of affidavit of intestacy, 265.
 of wills, 264, 265.
 search in the, 565, 566.
 of annuities, 384,
- REGISTRATION**, 557.
 of title, 566, 568.
- REGRANT** after forfeiture, 427.
- RELEASE**, 629.
 proper assurance between joint tenants, 196.
 conveyance by, 216, 218, 242, 297, 629.
 from rent-charge of part of hereditaments not an extinguishment, 391.
 of powers by married women, 361.
- RELIEF**, 22, 149, 152, 154, 157, 431.
- RELIGIOUS** association, conveyance to, 99.
 vesting of property in new trustees, 207.
 incorporation of trustees, 101.
- REMAINDER**, 291, 299, 307.
 bar of, after an estate tail, 68, 74, 75.
 arises from express grant, 291.
 no tenure between particular tenant and remainderman, 299.
 vested, 300, 301.
 vested, may be conveyed by deed of grant, 301.
 estates in remainder, 305.

- REMAINDER**, definition of vested, 302.
 example of vested, 316.
 contingent.—See **CONTINGENT REMAINDER**.
 of copyholds, 447.
- REMUNERATION**, professional, 235—239, 526.
- RENEWABLE** leases, 287, 480, 481.
- RENT**, 152, 154, 292, 462.
 on mining lease, 37.
 quit, 154, 157.
 demand for, 294.
 remedy by statute, 295.
 reservation of, 293, 464.
 apportionment of, 39, 40, 391, 468.
 of estate in fee simple, 152, 154.
 service, 292, 293, 299, 431, 462.
 passes by grant of reversion, 296, 464.
 not lost now by merger of reversion, 298.
 none incident to a remainder, 299.
 seck, 382, 386.
 of copyhold, 431.
 redemption of certain rents, 154, n.
 fee farm, 471, n.
 limitations of actions and suits for, 552.
- RENT charge**, 383, 402, 552, 496.
 valid in equity against persons having notice,
 although not registered, 384, n.
 power to grantee to distrain for, 386.
 statutory powers of distress, entry, &c., 387.
 estate for life in, 388.
 estate in fee simple in, 389.
 release of, 391.
 apportionment of, 391.
 accelerated by merger of prior term, 492.
 grantee of, has no right to the title deeds, 557.
 creation of, under the Statute of Uses, 385.
 bankruptcy of owner of land subject to, 392,
 393, n.)
 order vesting disclaimed property, 393.
 exoneration of executors and administrators from
 liability to pay, 392.
- RESIDUARY** devise, 252.
- RESIGNATION**, agreement for, 396.
- RESULTING** use, 189.
- REVERSION**, 291, 296.
 bar of, expectant on an estate tail, 68, 74, 75.
 on a lease for years, 291, 464.
 lessor's covenants binding, 464.
 severance of, 464, 467.

REVERSION, on lease for life, 292.
 difficulty in making a title to, 559.
 purchaser of, 559.
 31 Vict. c. 4...559, n.

REVOCATION, conveyance with clause of, 102.
 of wills, 250, 251.

RIVER, soil of, 379.
 rights of owner of lands adjoining to, 379.

ROAD, soil of, 379.

RULES, technical, in construing a will, 254, 260.

S.

SALE of copyhold estates by trustee in bankruptcy, 429.
 of settled estates, 31, 48, 49.
 by tenant in tail, 80.
 of infant's land, 81.
 for payment of debts, 261, 262, 367.
 power of, in settlements, 356.
 in mortgages, 510.
 of mortgaged property, 508, 511.
 action for, 509.
 rights of vendors and purchasers on sales made after 31st
 December, 1881...542.
 of leaseholds, 540, 544.
 of underlease, 543, 544.
 contract for.—See AG

SATISFIED terms, 494.

SCHOLASTIC logic, 199, 322.

 sites for 98, 100.

SCIENTIFIC institutions, 99, 207.
 incorporation of trustees, 101.

SCINTILLA juris, 342, 343.

SEA-SHORE, rights of owner of adjoining lands to, 1
 rights of the crown to, 380.

SEARCHES for incumbrances, &c., 117, 524, n., 565, 5
 official, 566.

SEIGNORY, 374.
 in gross, 382.

- SEISIN**, 126, 171, 186, 219, 342, 421, 598.
 transfer of, required to be notorious, 220, 318.
 actual seisin required for curtesy, 276, 641.
 legal seisin required for dower, 282.
 of copyhold lands is in the lord, 418.
- SEIZURE** of copyholds, 443.
- SEPARATE** property of wife, 120, 266, 267, 268, 273, 275, n.,
 280, 445, 449.
 trusts for separate use enforced, 267.
 copyholds which are wife's separate property, 441, 450.
- SEQUESTRATION** of profits of benefice, 120.
- SERJEANTY**, grand, tenure of, 158.
 petit, tenure of, 158.
- SERVI**, 146, 407, n.
- SERVICES**, feudal, 63.
- SERVIENT** tenement, 555.
- SETTLED** estates, leases and sales of, 31, 48, 55.
- SETTLED** Land Act, 1882 . . 367.
 waste, 32.
 powers of leasing, 35.
 improvements by tenant for life, 43—46.
 sale under, 49.
 application of capital money, 49.
 tenants for life under the Act, 54.
 proceedings for protection of land settled, 55.
 powers of wife under the Act, 280.
- SETTLEMENT**, 72.
 protector of, 74, 75, 428, 445.
 on infants on marriage, 89, 350.
 voluntary, 102.
 extract from a, 333.
 of copyholds, 445.
- SEVERALTY**, 129, 167. }
- SEVERANCE** of joint tenancy, 166.
 of reversion, 467.
- SHELLEY's** case, rule in, 303, 305, 309, 310, n.
- SHIFTING** use, 339, 341, 342, 364, 367, 371, 448.
 no limitation construed as, which can be regarded
 as a remainder, 342.
 in copyhold surrenders,
- SIGNING** of deeds, 183.
 of wills, 248, 249.
- SIMONY**, 399.

SITES for schools, 98, 100.

for places of worship and burial, 99.

SOCAGE, tenure of free and common, 148, 150, 151, 152.

derivation of word, 150, n.

i, 408.

i, **LIBER**, 148, 151.

SOIL of river, 379.

of road, 379.

SOLICITORS' Remuneration Act, 1881 . . 238, 326.

new principles of remuneration, 233, 237.

remuneration by commission or percentage, 238.

agreement as to amount and mode of, 239, 326.

SONS, descent to, 127, 136.

SPECIAL occupant, 26, 142.

SPECIALTY, heir bound by, 104, 334.

SPECIFIC performance, rights of purchaser in case of action for, 345.

NO uses, 321, 339, 342, 343, 364, n., 371, 448.

on deeds,

abolition of progressive duty, 181, 230, n.

on purchase deeds, 229, 230.

on conveyances in consideration of annuities, 390, n.

on agreements, 201, n.

on declarations of trust, 201, n.

on appointment of new trustees of charity property, 207.

on presentation to ecclesiastical benefice, 396.

on agreements for leases, 459, n.

on orders of court vesting trust property, 207.

on lease for year now repealed, 217, n.

on surrender of copyholds, 439, n.

on leases, 459, n.

on assignment of leases, 472, n.

on covenant to surrender copyholds, 533, n.

on appointment of new trustees, 211.

on covenant for production of title deeds, 500, n.

on mortgages, 500, n.

on transfer of mortgage, 519, n.

on securities for the payment of money advanced on an account current, 526, n.

STATUTES cited :

9 Hen. III. c. 29 (Magna Charta, freemen), 423, n.

9 Hen. III. c. 32 (Magna Charta, alienation), 63.

20 Hen. III. c. 4 (approvement), 6, 606, 613.

3 Edw. I. c. 39 (limitation), 554.

4 Edw. I. c. 6 (warranty), 64, 530.

6 Edw. I. c. 3 (warranty), 531.

STATUTES cited :

- 6 Edw. I. c. 5 (waste), 31.
- 12 Edw. I. (Statutum Walliæ), 620.
- 13 Edw. I. c. 1 (De donis), 6, 7, 21, 61, 84, 330, 424, 531, 603, 644.
- 13 Edw. I. c. 18 (judgments), 108, 204.
- 13 Edw. I. c. 32 (mortmain), 66.
- 13 Edw. I. c. 46 (commons), 613.
- 18 Edw. I. c. 1 (Quia emptores), 24, 85, 108, 144, 147, 157, 328, 375, 390, 425, 471, 611.
- 18 Edw. I. c. 2 (apportionment of services), 85.
- 18 Edw. I. stat. 4 (fines), 70.
- 25 Edw. III. stat. 2 (natural-born subjects), 88.
- 34 Edw. III. c. 16 (fines), 71.
- 15 Rich. II. c. 6 (vicarages), 398.
- 4 Hen. IV. c. 12 (vicarages), 398.
- 1 Rich. III. c. 1 (uses), 188.
- 1 Rich. III. c. 7 (fines), 71.
- 4 Hen. VII. c. 24 (fines), 71.
- 11 Hen. VII. c. 20 (tenant in tail *ex provisione viri*), 77, 531.
- 19 Hen. VII. c. 15 (uses), 204.
- 21 Hen. VIII. c. 4 (executors renouncing), 363, 448.
- 26 Hen. VIII. c. 13 (forfeiture for treason), 80, 156.
- 27 Hen. VIII. c. 10 (Statute of Uses), 20, 86, 178, 185, 186, 188, 204, 219, 245, 259, 279, 284, 338, 339, 361.
- 27 Hen. VIII. c. 10 (rent-charge), 385, 444.
- 27 Hen. VIII. c. 16 (enrolment of bargains and sales), 221, 243, 279.
- 27 Hen. VIII. c. 26 (Wales), 624.
- 27 Hen. VIII. c. 28 (dissolution of smaller monasteries), 400.
- 31 Hen. VIII. c. 1 (partition), 168.
- 31 Hen. VIII. c. 13 (dissolution of monasteries), 400.
- 32 Hen. VIII. c. 1 (wills), 24, 86, 245, 246, 363.
- 32 Hen. VIII. c. 2 (limitation of real actions), 541.
- 32 Hen. VIII. c. 7 (conveyances of tithes), 400, 401.
- 32 Hen. VIII. c. 24 (dissolution of monasteries), 400.
- 32 Hen. VIII. c. 28 (leases by tenant in tail, &c.), 78, 277.
- 32 Hen. VIII. c. 32 (partition), 168.
- 32 Hen. VIII. c. 34 (condition of re-entry), 295, 463, 465.
- 32 Hen. VIII. c. 36 (fines), 71, 77.
- 33 Hen. VIII. c. 39 (crown debts), 81, 115.
- 34 & 35 Hen. VIII. c. 5 (wills), 86, 245.
- 34 & 35 Hen. VIII. c. 20 (estates tail granted by crown), 76.
- 34 & 35 Hen. VIII. c. 26 (Wales), 624.
- 37 Hen. VIII. c. 9 (interest), 502.
- 3 & 4 Edw. VI. c. 3 (commons), 613.
- 5 & 6 Edw. VI. c. 11 (forfeiture for treason), 80, 156.
- 5 & 6 Edw. VI. c. 16 (offices), 120.
- 5 Eliz. c. 26 (palatine courts), 243.

STATUTES cited :

- 13 Eliz. c. 4 (crown debts), 81, 113.
 13 Eliz. c. 5 (defrauding creditors), 102.
 13 Eliz. c. 20 (charging benefices), 120.
 14 Eliz. c. 7 (collectors of tenths), 81.
 14 Eliz. c. 8 (recoveries), 77.
 27 Eliz. c. 4 (voluntary conveyances), 102.
 31 Eliz. c. 2 (fines), 71.
 31 Eliz. c. 6 (simony), 399.
 39 Eliz. c. 18 (voluntary conveyances), 102.
 21 Jac. I. c. 16 (limitations), 549.
 12 Car. II. c. 24 (abolishing feudal tenures), 7, 86, 133, 154, 158, 161, 245, 431.
 15 Car. II. c. 17 (Bedford level), 233.
 29 Car. II. c. 3 (Statute of Frauds), s. 1 (leases, &c., in writing), 183, 200, 223, 293, 455, 457, 458, 515.
 s. 2 (exception), 183, 293, 457, 458.
 s. 3 (assignments, &c., in writing), 183, 472, 477.
 s. 4 (agreements in writing), 200.
 s. 5 (wills), 246.
 ss. 7, 8, 9 (trusts in writing), 201.
 s. 10 (trust estates), 203, 204.
 s. 12 (estate pur autre vie), 24, 26.
 s. 16 (chattels), 474.
 2 Will. & Mary, c. 5 (distress for rent), 294.
 3 Will. & Mary, c. 14 (creditors), 105, 204.
 4 & 5 Will. & Mary, c. 16 (second mortgage), 522.
 4 & 5 Will. & Mary, c. 20 (docket of judgments), 109.
 6 & 7 Will. III. c. 14 (creditors), 105.
 7 & 8 Will. III. c. 36 (docket of judgments), 109.
 7 & 8 Will. III. c. 37 (conveyance to corporations), 101.
 10 & 11 Will. III. c. 16 (posthumous children), 319.
 11 & 12 Will. III. c. 6 (title by descent), 88.
 2 & 3 Anne, c. 4 (West Riding registry), 231, 264.
 4 & 5 Anne, c. 16, ss. 9, 10 (attornment), 297, 376.
 s. 21 (warranty), 531.
 5 & 6 Anne, c. 18 (West Riding registry), 231, 243.
 6 Anne, c. 18 (production of *cætui quo vie*), 27, 277.
 6 Anne, c. 35 (East Riding registry), 231, 243, 264, 533.
 7 Anne, c. 5 (natural-born subjects), 88.
 7 Anne, c. 20 (Middlesex registry), 231, 264.
 8 Anne, c. 14 (distress for rent), 294.
 10 Anne, c. 18 (copy of enrolment of bargain and sale), 242.
 12 Anne, stat. 2, c. 12 (presentation), 399.
 12 Anne, stat. 2, c. 16 (usury), 516.
 4 Geo. II. c. 21 (aliens), 88.
 4 Geo. II. c. 28 (rent), 294, 295, 298, 383, 386, 478, 481.
 7 Geo. II. c. 20 (mortgage), 505, 508.
 8 Geo. II. c. 6 (North Riding registry), 231, 243, 264, 533.
 9 Geo. II. c. 36 (charities), 92, 93.

STATUTES cited :

- 11 Geo. II. c. 19 (rent), 39, 294, 297.
- 14 Geo. II. c. 20 (common recoveries), 69, 74.
s. 9 (estate pur autre vie), 27.
- 25 Geo. II. c. 6 (witnesses to wills), 248.
- 25 Geo. II. c. 39 (title by descent), 88.
- 9 Geo. III. c. 16 (crown rights), 549.
- 13 Geo. III. c. 21 (natural-born subjects), 88.
- 25 Geo. III. c. 35 (crown debts), 81, 115.
- 31 Geo. III. c. 32 (Roman Catholics), 29.
- 39 Geo. III. c. 93 (treason), 156.
- 39 & 40 Geo. III. c. 56 (money land), 197.
- 39 & 40 Geo. III. c. 88 (escheat), 156.
- 39 & 40 Geo. III. c. 98 (accumulation), 372, 373.
- 41 Geo. III. c. 109 (General Inclosure Act), 376.
- 44 Geo. III. c. 98 (stamps), 231.
- 47 Geo. III. sess. 2, c. 24 (forfeiture to the crown), 156.
- 47 Geo. III. sess. 2, c. 25 (half-pay and pensions), 120.
- 47 Geo. III. c. 74 (debts of traders), 106, 204.
- 48 Geo. III. c. 149 (stamps), 231.
- 49 Geo. III. c. 126 (offices), 120.
- 53 Geo. III. c. 141 (inrolment of memorial of life annuities), 384.
- 54 Geo. III. c. 145 (attainder), 156.
- 54 Geo. III. c. 168 (attestation to deeds exercising powers), 346.
- 55 Geo. III. c. 184 (stamps), 181, 231.
- 55 Geo. III. c. 192 (surrender to use of will), 442.
- 57 Geo. III. c. 99 (benefices), 120.
- 59 Geo. III. c. 94 (forfeiture to the crown), 156.
- 1 & 2 Geo. IV. c. 121 (crown debts), 115.
- 3 Geo. IV. c. 92 (annuities), 384.
- 6 Geo. IV. c. 16 (bankruptcy), 344.
- 6 Geo. IV. c. 17 (forfeited leaseholds), 157.
- 7 Geo. IV. c. 45 (money land), 197.
- 7 Geo. IV. c. 75 (annuities), 384.
- 9 Geo. IV. c. 31 (petit treason), 156.
- 9 Geo. IV. c. 85 (charities), 93.
- 9 Geo. IV. c. 94 (resignation), 376.
- 10 Geo. IV. c. 7 (Roman Catholics), 29.
- 11 Geo. IV. & 1 Will. IV. c. 47 (sale to pay debts), 47, 90, 106, 204, 367.
- 11 Geo. IV. & 1 Will. IV. c. 60 (trustees), 206.
- 11 Geo. IV. & 1 Will. IV. c. 65 (infants, &c.), 90, 443, 444, 481.
- 11 Geo. IV. & 1 Will. IV. c. 70 (administration of justice), 114, 243.
- 2 & 3 Will. IV. c. 71 (Prescription Act), 555, 626.
 - s. 1 (rights of common, &c.), 556.
 - s. 2 (way, water), 556.
 - s. 3 (light), 556.
 - s. 4 (acquiescence), 556.
 - s. 7 (disabilities), 556.
 - s. 8 (ways, waters), 557.

STATUTES cited:

- 2 & 3 Will. IV. c. 100 (tithes), 552.
 2 & 3 Will. IV. c. 115 (Roman Catholics), 29.
 3 & 4 Will. IV. c. 27 (limitations), 549.
 s. 1 (rents, tithes, &c.), 552.
 s. 2 (estate in possession), 548.
 s. 3 (remainders and reversions)
 550.
 s. 14 (acknowledgment of title),
 550.
 ss. 16—18 (disabilities), 550, 552.
 s. 25 (express trust), 550.
 s. 26 (concealed fraud), 551.
 s. 27 (acquiescence), 551.
 s. 28 (mortgage), 552.
 s. 30 (advowson), 552.
 s. 33 (advowson), 552.
 s. 34 (extinguishment of right),
 553.
 s. 36 (abolishing real actions), 31,
 128, 168, 287, 541.
 s. 39 (warranty not to defeat
 right of entry), 532.
 s. 40 (judgments, legacies, &c.),
 552.
 3 & 4 Will. IV. c. 42 (distress for rent), 294.
 3 & 4 Will. IV. c. 74 (fines and recoveries abolished),
 69, 71, 279, 361, 427.
 ss. 4, 5, 6 (ancient demesne), 161.
 s. 14 (warranty), 532.
 s. 15 (leases), 79.
 s. 18 (reversion in the crown),
 76, 77.
 s. 22 (protector), 75.
 s. 32 (protector), 75.
 ss. 34, 35, 36, 37 (protector), 75.
 s. 40 (will, contract), 78, 79.
 s. 41 (inrolment), 70, 79.
 ss. 42—47 (protector), 75.
 s. 50 (copyholds), 428, 446.
 s. 53 (equitable estate tail in
 copyholds), 445.
 s. 54 (entry on court rolls), 445.
 ss. 56—73 (bankruptcy), 81, 429.
 ss. 70, 71 (money land), 197.
 s. 74 (inrolment), 70.
 ss. 77—80 (alienation by married
 women), 279, 280, 361,
 447.
 ss. 84—86 (acknowledgment of
 deed by married woman),
 280.
 s. 90 (wife's equitable copyholds),
 446.

STATUTES cited :

- 3 & 4 Will. IV. c. 87 (inclosure, enrolment of award), 376.
- 3 & 4 Will. IV. c. 104 (simple contract debts), 106, 204, 428.
- 3 & 4 Will. IV. c. 105 (dower), 281, 285, 286, 451.
- 3 & 4 Will. IV. c. 106 (descents), 11, 123, 124, 125, 132, 134, 135, 260, 315, 430, 601, 638.
- 4 & 5 Will. IV. c. 22 (apportionment), 39.
- 4 & 5 Will. IV. c. 23 (trust estates), 157, 199, 206.
- 4 & 5 Will. IV. c. 30 (common fields exchange), 378.
- 4 & 5 Will. IV. c. 83 (tithes), 552.
- 4 & 5 Will. IV. c. 92 (fines and recoveries, Ireland), 279.
- 5 & 6 Will. IV. c. 41 (usury), 516.
- 6 & 7 Will. IV. c. 19 (Durham), 115.
- 6 & 7 Will. IV. c. 71 (commutation of tithes), 401, 402.
- 6 & 7 Will. IV. c. 115 (inclosure of common fields), 378.
- 7 Will. IV. & 1 Vict. c. 26 (wills), 246, 256, 348, 350, 389, 423.
- s. 2 (repeal of old statutes), 155, 389, 442.
- s. 3 (property devisable), 27, 155, 246, 327, 389, 423, 440, 442, 586.
- ss. 4, 5 (copyholds), 442.
- s. 6 (estate pur autre vie), 27, 389, 423.
- s. 7 (minors), 154.
- s. 9 (execution and attestation), 246, 442.
- s. 10 (execution of appointments), 348.
- ss. 14—17 (witnesses), 249.
- ss. 18, 20, 21 (revocation), 250, 251.
- s. 23 (subsequent disposition), 251.
- s. 24 (will to speak from death of testator), 252.
- s. 25 (residuary devise), 252.
- s. 26 (general devise), 473.
- s. 27 (general devise an exercise of general power), 351.
- s. 28 (devise without words of limitation), 25, 256.
- s. 29 (death without issue), 257.
- ss. 30, 31 (estates of trustees), 259.
- s. 32 (estate tail, lapse), 253.
- s. 33 (devise to issue, lapse), 253.
- 7 Will. IV. & 1 Vict. c. 28 (mortgages), 549, 553.

STATUTES cited :

- 7 Will. IV. & 1 Vict. c. 69 (tithe commutation), 401.
 1 & 2 Vict. c. 20 (Queen Anne's bounty), 533.
 1 & 2 Vict. c. 64 (tithes), 401, 402.
 1 & 2 Vict. c. 69 (trust estates), 206.
 1 & 2 Vict. c. 92 (Record Office), 565.
 1 & 2 Vict. c. 106 (benefices), 120.
 1 & 2 Vict. c. 110 (judgment debts, insolvency), 81, 109,
 110, 111, 114, 118, 205, 344, 428, 473.
 2 & 3 Vict. c. 11 (judgments, &c.), 109, 110, 111, 115,
 116, 117, 205, 429, 474.
 2 & 3 Vict. c. 37 (interest), 516.
 2 & 3 Vict. c. 60 (mortgage to pay debts, infants), 47,
 90, 367.
 2 & 3 Vict. c. 62 (tithes), 401, 402.
 3 & 4 Vict. c. 15 (tithes), 401.
 3 & 4 Vict. c. 31 (inclosure), 376, 378.
 3 & 4 Vict. c. 55 (draining, now repealed), 40.
 3 & 4 Vict. c. 82 (judgments), 110, 111.
 3 & 4 Vict. c. 113 (spiritual persons), 399.
 4 & 5 Vict. c. 21 (abolishing lease for a year), 216, 223,
 231, 631.
 4 & 5 Vict. c. 35 (copyholds), 160, 433, 434, 436, 437,
 438, 439, 440, 442, 443.
 4 & 5 Vict. c. 38 (sites for schools), 98, 99.
 5 Vict. c. 7 (tithes), 401.
 5 & 6 Vict. c. 32 (fines and recoveries in Wales and
 Cheshire), 565.
 5 & 6 Vict. c. 54 (tithes), 401.
 5 & 6 Vict. c. 116 (insolvency), 118.
 6 & 7 Vict. c. 23 (copyholds), 434.
 6 & 7 Vict. c. 73 (solicitor's bills), 236.
 6 & 7 Vict. c. 85 (interested witnesses), 249.
 7 & 8 Vict. c. 37 (sites for schools), 98, 99.
 7 & 8 Vict. c. 55 (copyholds), 434.
 7 & 8 Vict. c. 66 (aliens), 87, 88.
 7 & 8 Vict. c. 76 (transfer of property, now repealed),
 171, 172, 216, 231.
 s. 2 (conveyance by deed), 216.
 s. 3 (partition, exchange, and assign-
 ment by deed), 129, 168, 472.
 s. 4 (leases and surrenders by deed),
 293, 458, 489.
 s. 5 (alienation of possibilities), 366.
 s. 6 (the words *grant* and *exchange*), 533.
 s. 7 (feoffment), 89.
 s. 8 (contingent remainders), 312, 328,
 331.
 s. 11 (indenting deeds), 182.
 s. 12 (merger of reversion on a lease),
 298.
 s. 13 (time of commencement), 216.
 7 & 8 Vict. c. 96 (insolvency), 118.
 8 & 9 Vict. c. 18 (lands clauses consolidation), 533.

STATUTES cited :

- 8 & 8 Vict. c. 56 (draining), 40.
 8 & 9 Vict. c. 99 (tenants of crown lands), 298, 466.
 8 & 9 Vict. c. 106 (amending law of real property), 171,
 172, 231, 298, 331, 333.
 s. 1 (contingent remainders), 312.
 s. 2 (grant), 217, 289.
 s. 3 (deed), 129, 159, 168, 178, 183,
 293, 300, 457, 458, 472, 477, 489.
 s. 4 (feoffment, &c.), 89, 178, 533.
 s. 5 (indenture), 182.
 s. 6 (possibilities), 327, 366.
 s. 7 (married women), 279.
 s. 8 (contingent remainders), 328, 331.
 s. 9 (reversion on lease), 299.
 8 & 9 Vict. c. 112 (satisfied terms), 494, 495.
 8 & 9 Vict. c. 118 (Inclosure Act), 169, 376, 377, 378.
 8 & 9 Vict. c. 119 (conveyances), 235, 238.
 8 & 9 Vict. c. 124 (leases), 235, 238.
 9 & 10 Vict. c. 70 (inclosure), 169, 376, 377, 378.
 9 & 10 Vict. c. 73 (tithes), 401, 402.
 9 & 10 Vict. c. 101 (draining), 41.
 10 & 11 Vict. c. 11 (draining), 41.
 10 & 11 Vict. c. 38 (draining), 377.
 10 & 11 Vict. c. 102 (bankruptcy and insolvency), 110,
 118.
 10 & 11 Vict. c. 104 (tithes), 401.
 10 & 11 Vict. c. 111 (inclosure), 169, 376, 378.
 11 & 12 Vict. c. 70 (proclamations of fines), 71.
 11 & 12 Vict. c. 87 (infant heirs), 90, 367.
 11 & 12 Vict. c. 99 (inclosure), 169, 376, 377, 378.
 11 & 12 Vict. c. 119 (draining), 41.
 12 & 13 Vict. c. 26 (leasing), 354, 355, 356.
 12 & 13 Vict. c. 49 (sites for schools), 98.
 12 & 13 Vict. c. 83 (inclosure), 169, 376, 377, 378.
 12 & 13 Vict. c. 89 (treasury commissioners), 115.
 12 & 13 Vict. c. 100 (drainage), 41.
 12 & 13 Vict. c. 106 (bankruptcy), 344, 430.
 13 & 14 Vict. c. 17 (leasing), 354, 355, 356.
 13 & 14 Vict. c. 21 (interpretation), 540.
 13 & 14 Vict. c. 28 (religious and educational trusts), 207.
 13 & 14 Vict. c. 31 (draining), 41.
 13 & 14 Vict. c. 56 (interest), 516.
 13 & 14 Vict. c. 60 (trustees), 47, 90, 157, 169, 199, 206,
 207, 368, 433.
 13 & 14 Vict. c. 97 (stamps), 181, 217, 230, 289.
 14 & 15 Vict. c. 24 (sites for schools), 98.
 14 & 15 Vict. c. 25 (emblems, distress, &c.), 38, 294.
 14 & 15 Vict. c. 53 (enclosure, tithes), 377, 401, 434.
 14 & 15 Vict. c. 83 (Lords Justices), 110.
 14 & 15 Vict. c. 99 (evidence), 249.
 15 & 16 Vict. c. 24 (Wills Act Amendment), 247.
 15 & 16 Vict. c. 48 (lunatics), 90.
 15 & 16 Vict. c. 49 (sites for schools), 98.

STATUTES cited :

- 15 & 16 Vict. c. 51 (copyhold enfranchisement), 434, 435, 436.
- 15 & 16 Vict. c. 55 (trustees), 47, 90, 206, 368.
- 15 & 16 Vict. c. 76 (common law amendment), 294, 295, 416, 505.
- 15 & 16 Vict. c. 79 (inclosures), 169, 376, 377, 378.
- 15 & 16 Vict. c. 86 (chancery amendment), 509.
- 16 & 17 Vict. c. 51 (succession duty), 335, 336, 337, 360.
- 16 & 17 Vict. c. 70 (idiots and lunatics), 90, 443, 444, 481.
- 16 & 17 Vict. c. 83 (witnesses), 249.
- 16 & 17 Vict. c. 107 (crown bonds), 116.
- 16 & 17 Vict. c. 124 (copyholds, inclosures, tithes), 401.
- 16 & 17 Vict. c. 137 (charity commissioners), 97, 98, 207.
- 17 & 18 Vict. c. 75 (alienation by married women), 280.
- 17 & 18 Vict. c. 83 (stamps), 390.
- 17 & 18 Vict. c. 90 (usury law repeal), 384, 516.
- 17 & 18 Vict. c. 97 (inclosures), 169, 376, 377, 378, 392.
- 17 & 18 Vict. c. 112 (literary and scientific institutions), 99, 207.
- 17 & 18 Vict. c. 113 (mortgage debts), 520.
- 17 & 18 Vict. c. 125 (common law procedure), 211, 212, 229.
- 18 & 19 Vict. c. 13 (estate of idiots and lunatics), 90.
- 18 & 19 Vict. c. 15 (purchasers' protection), 110.
 ss. 2, 3 (palatine courts), 114.
 ss. 4, 5 (notice to purchaser), 111.
 s. 6 (registration of judgments), 111.
 s. 10 (orders in bankruptcy), 111.
 s. 11 (mortgages), 518.
 ss. 12, 14 (annuities), 384.
- 18 & 19 Vict. c. 43 (settlements on infants), 89, 90, 350.
- 18 & 19 Vict. c. 124 (charity commissioners), 97, 98, 101, 207.
- 19 & 20 Vict. c. 9 (drainage), 41, 42.
- 19 & 20 Vict. c. 47 (joint-stock companies), 102, 533.
- 19 & 20 Vict. c. 97 (Mercantile Law Amendment Act), 474, 552.
- 19 & 20 Vict. c. 108, s. 73 (acknowledgment of deeds by married women), 279.
- 19 & 20 Vict. c. 120 (leases and sales of settled estates, now repealed), 34, 35, 48.
 s. 11 (sale of timber), 31.
 s. 35 (repeal of former Acts), 79, 277.
 ss. 44, 46 (commencement of Act), 34.
- 20 & 21 Vict. c. 14 (joint-stock companies), 102.
- 20 & 21 Vict. c. 31 (inclosures), 169, 377, 378.
- 20 & 21 Vict. c. 77 (Court of Probate), 11, 249, 250.
- 21 & 22 Vict. c. 27 (Chancery Amendment Act), 31, 213.
- 21 & 22 Vict. c. 45 (county of Durham), 115.
- 21 & 22 Vict. c. 53 (inclosure, tithes), 169, 377, 401, 434.
- 21 & 22 Vict. c. 60 (joint-stock companies), 102.
- 21 & 22 Vict. c. 77 (settled estates), 34, 48.
- 21 & 22 Vict. c. 94 (commutation of manorial rights), 434, 435, 436.

STATUTES cited :

- 21 & 22 Vict. c. 95 (Court of Probate), 11, 249.
- 22 Vict. c. 27 (literary institutions), 99.
- 22 & 23 Vict. c. 35 (property amendment and relief of trustees), 261.
 - ss. 1, 2 (effect of licence), 466, 467.
 - s. 3 (severance of reversion), 468.
 - s. 4 (relief against forfeiture), 469.
 - s. 5 (relief to be recorded on lease), 469.
 - s. 6 (Court to grant relief once only), 469.
 - ss. 7, 8 (insurance against fire), 469.
 - s. 10 (rent-charge), 391.
 - s. 11 (judgments), 125.
 - s. 12 (powers), 347.
 - s. 13 (purchase - money, mistaken payment), 357.
 - s. 14 (trustees of wills), 261.
 - s. 15 (trustees), 262.
 - s. 16 (executors, power to raise money), 262.
 - s. 17 (purchasers and mortgagees), 262.
 - ss. 19, 20 (inheritance, descent), 11, 123, 125, 127, 135.
 - s. 21 (assignment of personalty), 225.
 - s. 22 (index of crown debtors), 116.
 - s. 23 (payment of mortgage or purchase-money), 548.
 - s. 27 (liability of executors for rents, &c.), 473.
 - s. 28 (exoneration of executors from rent-charges, &c.), 392.
- 22 & 23 Vict. c. 43, ss. 10, 11 (Inclosure acts amendment, partition), 169, 377.
- 23 & 24 Vict. c. 38 (property amendment), 110, 112.
 - s. 1 (judgments), 112, 205, 429.
 - s. 2 (writs of execution to be registered), 112, 205.
 - s. 6 (restriction of waiver), 467.
 - s. 7 (uses, scintilla juris), 343.
- 23 & 24 Vict. c. 53 (Duke of Cornwall), 549.
- 23 & 24 Vict. c. 81 (completing proceedings under Tithe commutation acts), 377, 434.
- 23 & 24 Vict. c. 83 (infants' settlements), 89.
- 23 & 24 Vict. c. 93 (commutation of tithes), 401.
- 23 & 24 Vict. c. 115, s. 1 (crown bonds, &c.), 116.
 - s. 2 (entering satisfaction on judgment), 110.
- 23 & 24 Vict. c. 124, ss. 35, 39 (purchase of reversion of leaseholds), 481, 482.
- 23 & 24 Vict. c. 126 (law and equity), 207, 295.
 - ss. 26, 27 (dower), 287.
- 23 & 24 Vict. c. 134 (Roman Catholic charities), 29, 93.

INDEX.

STATUTES cited :

- 23 & 24 Vict. c. 136 (charities), 97.
 - s. 16 (majority of trustees, power of, to sell, &c.), 98.
- 23 & 24 Vict. c. 145 (power of sale, &c.), 357, 510.
 - ss. 8, 9 (renewal of leases and raising money), 357, 481.
 - s. 10 (consent to sale, &c.), 357.
 - s. 27 (power to appoint new trustees), 208.
 - s. 28 (death of trustee of will in lifetime of testator), 208.
 - s. 29 (trustees' receipts good discharges), 548.
 - s. 32 (negative declaration in settlements), 357, 510.
 - s. 34 (extent of the Act), 208, 357, 481, 510.
- 24 Vict. c. 9 (conveyance of land to charitable uses), 93.
 - s. 1 (reservation of rent, &c.), 94.
 - ss. 2—5 (separate deed; inrolment), 94, 96.
- 24 & 25 Vict. c. 62 (limitation as to crown suits), 549.
 - s. 2 (Duke of Cornwall, limitations as to suits by), 549.
- 24 & 25 Vict. c. 91, s. 31 (stamps), 181.
- 24 & 25 Vict. c. 95 (repeal of criminal statutes), 156.
- 24 & 25 Vict. c. 96, s. 28 (destruction, &c. of title deeds), 181.
- 24 & 25 Vict. c. 100 (attainder), 156.
- 24 & 25 Vict. c. 133 (draining), 377.
- 24 & 25 Vict. c. 134 (bankruptcy), 430.
- 25 Vict. c. 17 (charities), 95.
- 25 & 26 Vict. c. 53 (title and conveyance of real estates), 568.
- 25 & 26 Vict. c. 67 (declaration of title), 567.
- 25 & 26 Vict. c. 73 (inclosure commissioners), 377, 434.
- 25 & 26 Vict. c. 86 (lunatics), 90.
- 25 & 26 Vict. c. 89 (joint-stock companies), 102.
- 25 & 26 Vict. c. 108 (sale, minerals), 358.
- 25 & 26 Vict. c. 112 (charity commission), 97, 207.
- 26 & 27 Vict. c. 106 (charities), 96.
- 27 Vict. c. 13 (charities), 95, 96, 97.
- 27 & 28 Vict. c. 45 (settled estates), 34, 48.
- 27 & 28 Vict. c. 112 (judgments), 81, 112, 113, 203, 344, 429, 494, 518.
- 27 & 28 Vict. c. 114 (improvement of land), 41, 42, 43.
- 28 & 29 Vict. c. 73 (naval pay and pensions), 120.
- 28 & 29 Vict. c. 96 (stamps), 230.
- 28 & 29 Vict. c. 99 (county courts), 195, 207, 509.
- 28 & 29 Vict. c. 104 (crown suits), 116, 117.
- 28 & 29 Vict. c. 122 (simony), 399.
- 29 & 30 Vict. c. 57 (inrolment of charity deeds), 97.
- 29 & 30 Vict. c. 122 (metropolitan commons), 377.
- 30 & 31 Vict. c. 47 (lis pendens), 117.

STATUTES cited :

- 30 & 31 Vict. c. 48 (auctions of estates), 202.
 30 & 31 Vict. c. 69 (mortgage debts), 521.
 30 & 31 Vict. c. 87 (Court of Chancery), 90.
 30 & 31 Vict. c. 131 (companies), 102.
 30 & 31 Vict. c. 142 (county courts), 195, 203, 509.
 30 & 31 Vict. c. 143 (expiring laws continuance), 434.
 31 Vict. c. 4 (sales of reversions), 559.
 31 & 32 Vict. c. 40 (partition), 169.
 31 & 32 Vict. c. 44 (sites of buildings for religious purposes), 99, 100.
 s. 3 (inrolment of deed), 97.
 31 & 32 Vict. c. 54 (judgments), 114.
 31 & 32 Vict. c. 89 (commons), 377, 434.
 32 & 33 Vict. c. 36 (burial grounds), 207.
 32 & 33 Vict. c. 46 (specialty and simple contract debts), 107, 204.
 32 & 33 Vict. c. 56 (endowed schools), 98.
 32 & 33 Vict. c. 71 (bankruptcy), 344, 393, 430, 474.
 32 & 33 Vict. c. 83 (Insolvency Court), 567.
 32 & 33 Vict. c. 107 (inclosure), 377.
 32 & 33 Vict. c. 110 (charities), 97, 98, 207.
 33 Vict. c. 14 (naturalization), 87, 89, 198, 199.
 33 & 34 Vict. c. 23 (abolition of attainders), 30, 80, 91, 156, 199.
 33 & 34 Vict. c. 28 (attorneys' and solicitors' remuneration), 238, 526.
 33 & 34 Vict. c. 34 (trust funds), 101.
 33 & 34 Vict. c. 35 (apportionment), 40.
 33 & 34 Vict. c. 44 (stamps), 460.
 33 & 34 Vict. c. 56 (limited owners' residences), 43.
 33 & 34 Vict. c. 93 (married women's property), 270, 271, 447, 479.
 33 & 34 Vict. c. 97 (stamps), 181, 201, 202, 207, 211, 217, 229, 231, 390, 396, 440, 460, 472, 500, 519, 526, 533, 560.
 33 & 34 Vict. c. 99 (stamps repeal), 217, 229, 230, 390.
 33 & 34 Vict. c. 102 (naturalization), 89.
 34 Vict. c. 13, s. 4 (exemption from mortmain acts), 100.
 ss. 5, 6 (inrolment, limitation of gift), 100.
 34 & 35 Vict. c. 79 (lodgers' goods protection), 294.
 34 & 35 Vict. c. 84 (limited owners' residences act amendment), 42.
 s. 3 (improvements), 42.
 35 & 36 Vict. c. 24 (charitable trustees incorporation), 101, 208.
 s. 13 (inrolment), 97.
 35 & 36 Vict. c. 39 (naturalization), 89.
 35 & 36 Vict. c. 50 (railway rolling stock protection), 294.
 36 Vict. c. 19 (inclosures), 377.
 36 & 37 Vict. c. 42 (tithes of market gardens), 401.
 36 & 37 Vict. c. 50 (sites for places of worship and burial), 99.

STATUTES cited :

- 36 & 37 Vict. c. 66 (Supreme Court of Judicature Act, 1873), 31, 33, 115, 203, 206, 213, 287, 490, 505.
 s. 16 (transfer of jurisdiction), 70, 72, 75, 92, 94, 100, 168, 169, 191, 221, 243.
 ss. 16-19 (jurisdiction), 213.
 s. 17 (transfer of jurisdiction), 168, 191.
 s. 18 (transfer of jurisdiction), 191.
 s. 24 (law and equity to be concurrently administered), 213, 214, 215.
 s. 25, sub-sect. 2 (express trust), 551.
 sub-sect. 3 (waste), 33.
 sub-sect. 4 (merger), 490.
 sub-sect. 5 (mortgagor may sue in his own name), 505.
 sub-sect. 7 (time not essence of contract), 203.
 sub-sect. 8 (injunctions), 31, 215.
 sub-sect. 11 (rules of equity to prevail), 191.
 s. 34, sub-sect. 3 (Chancery Division), 129, 193, 215, 506.
 s. 77 (officers and offices), 70, 72, 75, 92, 94, 100, 221.
 36 & 37 Vict. c. 87 (endowed schools), 98.
 37 & 38 Vict. c. 33 (settled estates), 34, 48.
 37 & 38 Vict. c. 57 (limitations), 553, 554.
 37 & 38 Vict. c. 78 (Vendor and Purchaser Act, 1874), 264, 441, 523, 560.
 s. 1 (forty years' title), 540.
 s. 2 (lessor's title, recitals, title deeds, &c.), 541, 560, 571.
 s. 4 (conveyance of legal estate), 507.
 s. 5 (bare trust estate, now repealed), 141.
 s. 6 (married woman, bare trustee), 141, 280, 441.
 s. 7 (tacking, now repealed), 523.
 s. 8 (registration of wills), 264.
 37 & 38 Vict. c. 83 (Supreme Court of Judicature Commencement Act, 1874), 31, 33, 115, 168, 170, 191, 490.
 37 & 38 Vict. c. 87 (endowed schools), 98.
 37 & 38 Vict. c. 96 (statute law revision), 216, 223.
 38 & 39 Vict. c. 77 (Supreme Court of Judicature Act, 1875), 213.
 s. 7 (idiots and lunatics), 90, 206.

STATUTES cited :

- 38 & 39 Vict. c. 77, s. 10 (deceased insolvents, repeal of stat. 36 & 37 Vict. c. 66, s. 25, sub-sect. 1), 203.
- 38 & 39 Vict. c. 87 (Land Transfer Act, 1875), 141, 568.
 s. 48 (repeal and amended re-enactment of stat. 37 & 38 Vict. c. 78, s. 5), 141.
 s. 129 (repeal of stat. 37 & 38 Vict. c. 78, s. 7), 523.
- 38 & 39 Vict. c. 92 (agricultural holdings), 455, 457, 482, 485.
- 39 & 40 Vict. c. 17 (partition), 169.
- 39 & 40 Vict. c. 30 (settled estates), 34, 48.
- 39 & 40 Vict. c. 37 (crown rights), 549.
- 39 & 40 Vict. c. 56 (commons), 169, 377, 378.
- 39 & 40 Vict. c. 59 (appellate jurisdiction), 213.
- 39 & 40 Vict. c. 74 (agricultural holdings), 455, 482.
- 40 Vict. c. 9 (Judicature Act, 1877), 213.
- 40 Vict. c. 13 (stamps), 396.
- 40 & 41 Vict. c. 18 (settled estates), 35, 48, 91.
 s. 4 (leases), 28.
 ss. 4-15 (powers of leasing), 35.
 s. 16 (sale of timber), 31, 48.
 s. 17 (costs of proceedings for protection of estate), 55.
 ss. 18-37 (consideration for land sold for building, &c.), 48.
 s. 34 (sales), 48.
 s. 38 (exercise of powers), 48.
 ss. 44, 46 (leases by tenant for life), 34, 79, 277, 287.
 s. 47 (demise by husband), 34.
 s. 48 (execution of counterpart), 34.
 s. 57 (date of settlement), 34.
 s. 58 (repeal), 34.
- 40 & 41 Vict. c. 31 (water supply), 43.
- 40 & 41 Vict. c. 33 (contingent remainders), 320, 331, 365, 371, 448.
- 40 & 41 Vict. c. 34 (exoneration of charges), 197, 521.
- 41 Vict. c. 23 (acknowledgment, Ireland), 280.
- 41 & 42 Vict. c. 42 (tithes), 401.
- 41 & 42 Vict. c. 56 (commons), 377.
- 41 & 42 Vict. c. 71 (metropolitan commons), 377.
- 42 & 43 Vict. c. 37 (inclosure), 378.
- 42 & 43 Vict. c. 59 (outlawry), 29.
- 42 & 43 Vict. c. 78 (Judicature Act, 1879), 70, 72, 75, 92, 94, 100, 213, 221, 565.
- 44 Vict. c. 12, s. 41 (cesser of duties), 335.
- 44 & 45 Vict. c. 41 (Conveyancing and Law of Property Act, 1881), 171, 240, 381, 387, 422, 464, 470, 478, 496, 503, 542, 546, 560, 562, 571, 579, 580, 582.

STATUTES cited :

44 & 45 Vict. c. 41, s. 1 (commencement, extent), 226, 517, 528, 564.

s. 2 (interpretation), 514, 537, 547, 580.

s. 3 (contracts for sale), 543, 560.

s. 4 (completion of contract after death), 263.

s. 5 (discharge of incumbrances on sale), 547.

s. 6 (general words), 240, 241, 382, 574, 575, 579.

s. 7 (covenants for title), 240, 241, 536, 537, 538, 539, 581.

s. 9 (production, &c. of title deeds), 562, 563.

s. 10 (leases), 296, 464, 465.

s. 11 (covenants to run with reversion), 464.

s. 12 (apportionment on severance), 468.

s. 13 (sub-demise), 546.

s. 14 (forfeiture), 465, 469, 470.

s. 15 (mortgages), 519.

s. 17 (consolidation of mortgage), 528.

s. 18 (leases), 503, 504.

s. 19 (powers of mortgagee), 511, 514.

s. 20 (exercise of power of sale), 511.

s. 21 (conveyance by mortgagee), 511, 512.

s. 24 (receiver), 511.

s. 25 (action respecting mortgage), 509.

s. 30 (trust and mortgage estates on death), 142, 165, 199, 263, 507.

s. 31 (new trustee), 208, 209.

s. 32 (retirement of trustee), 210.

s. 33 (powers of new trustee), 207.

s. 34 (vesting estate in new trustee), 210, 211.

s. 36 (trustees' receipts), 549.

s. 39 (married women), 269.

s. 41 (infant owner in fee simple), 91, 154.

s. 42 (management during minority), 154.

s. 44 (rentcharges, &c.), 387.

s. 45 (redemption of quit rents), 154, 431.

s. 49 words in deeds of grant), 242.

s. 50 conveyance to self), 226, 273.

s. 51 words of limitation), 175, 192, 196, 241, 258.

s. 52 (powers simply collateral), 360.

INDEX.

STATUTES cited:

- 44 & 45 Vict. c. 41, s. 54 (receipt in deed), 229, 241.
- s. 55 (receipt in or on deed), 229.
- s. 59 (covenants to bind heirs), 104, 534, 536.
- s. 60 (covenant with two or more jointly), 536.
- s. 61 (advance on joint account), 517, 518.
- s. 63 (all the estate), 240, 241, 574, 575, 580.
- s. 64 (construction of implied covenants), 536.
- s. 65 (long terms), 496, 497.
- s. 71 (repeals), 208, 235, 496, 510, 548.
- 44 & 45 Vict. c. 44 (Solicitors' Remuneration Act, 1881), 238, 239, 526.
- 44 & 45 Vict. c. 68 (Judicature Act, 1881), 213.
- 45 & 46 Vict. c. 38 (Settled Land Act, 1882), 35, 43, 49, 55, 356, 358.
- s. 1 (short title), 354.
- sub-sect. 3 (Act not to extend to Scotland), 35.
- s. 2 (definitions), 49.
- sub-sects. 5, 10 (definitions), 202.
- sub-sect. 9 (definitions), 32, 49.
- s. 3 (sale, &c.), 49, 169, 436.
- s. 4 (regulations respecting sale, &c.), 52.
- s. 6 (leases), 32, 35.
- s. 7, sub-sect. 1 (leases), 36.
- sub-sects. 2, 3, 4 (leases), 36.
- s. 8 (building and mining leases), 36.
- s. 9 (mining leases), 36.
- s. 10, sub-sects. 1, 2 (variation of building and mining lease, 36, 37.
- s. 11 (mining rent), 37.
- s. 12 (special powers), 38.
- s. 14 (copyholds), 419.
- s. 15 (mansion and park), 35, 49.
- s. 17, sub-sects. 1, 2 (surface and minerals), 359.
- s. 20 (conveyance), 169, 367, 436.
- sub-sects. 1, 2 (conveyance), 53.
- s. 21 (investment, &c.), 32, 49.
- (iii.) (improvement, 43.
- s. 22, sub-sect. 1 (investments), 51.
- sub-sect. 2 (investments), 51.
- sub-sects. 3-7 (investments), 52.
- s. 25 (improvements), 43.
- sub-sects. 1, 2, 3 (drainage), 44, 45.

STATUTES cited :

- 45 & 46 Vict. c. 38, s. 27 (concurrence in improvements), 46.
s. 28, sub-sects. 1—3 (tenant for life), 46.
s. 29 (execution and repair of improvements), 32.
s. 30 (Improvement of Land Act, 1864), 43.
s. 32 (application of money), 48.
s. 33 (application of money), 48.
s. 35, sub-sects. 1, 2 (timber), 32.
s. 36 (settled land), 55.
s. 45 (notice to trustees), 35, 52.
s. 47 (payment of costs), 55.
s. 48 (Land Commissioners), 42, 169, 377, 391, 435.
s. 50 (powers), 361.
s. 53 (tenant for life trustee), 52.
s. 57 (additional powers by settlement), 37.
s. 58 (limited owners), 277.
sub-sect. 1 (limited owners), 54, 79.
s. 59 (infant tenant for life), 91.
s. 60 (tenant for life, infant), 55, 91.
s. 61 (married woman), 280, 281.
s. 62 (tenant for life, lunatic), 90.
s. 64 (repeals), 55, 358, 481.
s. 65, sub-sect. 10 (term of lease), 35.
45 & 46 Vict. c. 39 (Conveyancing Act, 1882), 361.
s. 2 (commencement), 117, 118, 566, 567.
s. 6 (powers), 361.
s. 7 (acknowledgment of deeds), 280, 566.
s. 10 (executory limitations), 370.
s. 11 (long terms), 498.
s. 12 (mortgages), 519.
45 & 46 Vict. c. 75 (Married Women's Property Act, 1882), 91, 266, 270, 278, 450.
s. 1, sub-sect. 1 (feme sole), 441, 480.
s. 2 (feme sole), 441, 480.
s. 5 (feme sole), 266, 441, 480.
s. 19 (saving of existing settlements), 120, 269.
s. 22 (repeal), 270.
s. 25 (commencement), 270.
46 & 47 Vict. c. 49 (Statute Law Revision Act, 1883), 212, 213, 287, 505.
46 & 47 Vict. c. 52 (Bankruptcy Act, 1883).
s. 20 (adjudication), 118, 206, 474.
s. 42 (distrain for rent), 344.
s. 44 (property divisible amongst creditors), 118, 206, 474.

STATUTES cited:

- 46 & 47 Vict. c. 52, s. 50, sub-sect. 4 (realization of property), 430.
 s. 52 (sequestration of ecclesiastical benefice), 120.
 s. 53 (pay, or salary), 121.
 s. 54 (vesting and transfer of property), 118, 474.
 s. 55 (disclaimer of onerous property), 392.
 sub-sects. 1—7 (disclaimer of onerous property), 393, 475—477.
 s. 56 (powers of trustee), 344.
 sub-sect. 5 (powers of trustee), 81, 429.
 s. 121 (small bankruptcies), 475, 476.
 s. 125 (administration of insolvent estate), 107, 142, 204, 263.
 s. 146, sub-sect. 1 (writ of elegit), 108.
 s. 147 (bankrupt trustee), 206.
 s. 168 (interpretation), 118, 206.
 s. 169 (repeal), 474.
 46 & 47 Vict. c. 61 (Agricultural Holdings Act, 1883), 483.
 s. 1 (compensation for improvements), 483.
 s. 2 (improvements executed before commencement of Act), 483.
 s. 3 (consent of landlord as to improvements), 483.
 s. 4 (notice to landlord as to improvements), 484, 485.
 s. 5 (contracts of tenancy), 484.
 s. 8 (compensation settled by reference), 483.
 ss. 9—22 (referees, umpires, submission), 483.
 s. 22 (submission), 483.
 s. 23 (appeal to County Court), 483.
 ss. 29—32 (charge of tenants' compensation), 485.
 s. 33 (notice to quit), 456.
 s. 34 (fixtures), 486.
 s. 41 (resumption for improvements), 457.
 ss. 44—52 (distress), 486.
 ss. 44—55 (distress and general provisions), 294.
 s. 53 (commencement), 483.
 s. 54 (holdings to which Act applies), 457, 483.
 s. 55 (avoidance of agreement inconsistent with Act), 484.

46 & 47 Vict. c. 61, s. 57 (compensation), 485.
s. 59 (improvements by tenant about to quit), 484.
s. 61 (interpretation), 483, 484.
s. 62 (repeal), 455.

47 & 48 Vict. c. 18 (Settled Land Act, 1884), 34.
s. 4 (fine on a lease to be capital money), 37.
s. 5 (notice as to sale, &c.), 35, 52.
s. 8 (curtesy), 277.

47 & 48 Vict. c. 53 (expiring laws continuance), 377, 434.

47 & 48 Vict. c. 54 (Yorkshire Registries Act, 1884), 231, 243.
s. 2 (commencement), 525.
s. 4 (assurances and wills), 232.
s. 7 (memorandum of lien or charge), 525.
s. 11 (notices of wills not proved), 232, 265.
s. 12 (affidavit of intestacy), 232, 265, 525.
s. 14 (priority of assurances and wills), 232, 265.
s. 15 (registration to be actual notice), 525.
s. 16 (legal estate and tacking), 525.
ss. 20-23 (official searches and certified copies), 565.
s. 31 (offices), 565.
s. 51 (repeal), 265.

47 & 48 Vict. c. 61 (Judicature Act, 1884), 213.

47 & 48 Vict. c. 71 (Intestates Estates Act, 1884), 157.
s. 4 (escheat of real estate), 198, 374.
s. 7 (definition of intestacy), 198.

SUIT of Court, 150, 152, 155, 157, 430.

SUPREME Court of Judicature Acts (see stats. 36 & 37 Vict. c. 66, 38 & 39 Vict. c. 77, 44 & 45 Vict. c. 68, and 47 & 48 Vict. c. 61).

SURRENDER of life interest, 331.

of copyholds, 427, 437, 439, 444, 445, 446, 449, 649.
 nature of surrenderee's right, 440.
 of copyholds of a married woman, 440, 441.
 of a term of years, 488, 489, 491.
 in law, 480.
 of mortgaged estate, 507, n.

SURVIVORS of joint tenants entitled to the whole, 163.

of copyhold joint tenants do not require fresh admittance, 433.

T.

TABLE of descent, explanation of, 136.

TACKING, 523, 529.

TAIL, estate, 57, 58, 65, 66, 75, 76, 82, 175, 196, 229, 253, 255, 258, 307, 308, 370.

derivation of word, 65.

inrolment of disentailing deeds, 70, n., 72, 74.

destruction of entails, 66.

quasi entail, 82.

constructive estate, in a will, 257.

bar of estate, 68, 70, 74, 76, 78, 79, 427, 445.

descent of estate, 80, 82, 130, 595.

words *in tail*, *in tail male*, *in tail female* used in conveyance of estate of inheritance, 175, 422.

tenant in, after possibility of issue extinct, 76.

tenant in, *ex proutione viri*, 77.

sale and exchange by tenant in tail, 80.

equitable estate, 196.

no lapse of an estate, 253.

joint tenants in, 162.

estate not subject to merger, 330.

in copyholds, 424, 430.

equitable, in copyholds, 445.

TALTARUM's case, 66.

TENANT for life, 28, 30, 33, 34, 74—(and see **LIFE**).

conveyance by, 47, 367.

sale or mortgage of his life interest, 47.

improvements by, under Settled Land Act, 1882... 43—46.

to maintain improvements, 45.

to insure buildings, 45.

- TENANT** not to cut timber planted as an improvement, 46.
 power of sale and exchange, 49.
 notice, 52.
 power of conveyance, 53.
 infant tenant for life, 54.
 persons having powers of, under Settled Land Act, 1882 . . 54.
 equitable tenant for life, 201.
 costs of, in protecting estates, 55.
 in tail, 58—(and see **TAIL**).
 for life, feoffment by, 177.
 in dower, leases by, 286.
 in fee simple, 83—(and see **FEE SIMPLE**).
 in common, 167.
 of copyhold, 433.
 enfranchisement by, 436.
 at will, 417, 454.
 right of, to inspect court rolls, 438.
 by sufferance, 455.
- TENANTS** *in capite*, 145.
- TENANTS'** improvements, 482.
 fixtures, 486.
- TENEMENTS**, 6, 7, 8, 8, n., 9, 17.
- TENURE** of an estate in fee simple, 143, 153.
 of an estate tail, 143.
 in burgage, 149.
 in villenage, 405.
 none of purely incorporeal hereditaments, 394.
 of copyholds, 430.
 by knight service, 149, 152.
- TENURES**, feudal, introduction of, 3.
- TERM** of years, tenant for, 9, 29, 452, 454, 456, 461—(and see **LEASE**).
 long terms for securing money, 486.
 husband's rights in his wife's, 479.
 wife's equitable interest in a term of years, 479.
 equity to a settlement, 479.
 attendant on the inheritance, 491, 492.
 mortgage for, 512.
 for securing portions, 488.
 attendant, by construction of law, 494.
 enlargement of long term into fee simple, 496, 497.
- TESTATUM**, 227, 233, 247, 571, 581, 628, 630.
- THELLUSSON**, Mr., will of, 372.
 Act, 372.
- "THINGS** real, personal, or mixed," 8, n.
- TILLAGE**, 612, 621.

TIMBER, 30, 31, 32, 33, 46, 78, 103.

on copyhold lands, 418.

on mortgaged lands, 511.

TIME, unity of, in joint tenancy, 162, 165.

where not of essence of a contract, 202.

within which an executory interest must arise, 368.

limited for making entry on court roll of disentailing deed, 445, n.

limited by statutes of limitations, 493, 549, 552, 553.

TITHES, 400, 613, 625.

lay, 400, 552.

conveyances of tithes, 401.

distinct from the land, 401.

commutation of, 401.

remedies for the recovery of a tithe rent-charge, 402.

limitations of actions for, 552.

TITLE, 530.

covenants for, 240, 533, 535, 572, 682.

now implied by statute in certain cases,
535—538.

cases in which covenants for title are not now implied,
538.

covenants implied by statute may be varied by deed, 539.

documents of title dated before commencement of, 513.

sixty years formerly required, 539, 540.

reasons for requiring sixty years, 541.

forty years now sufficient, 540.

act for obtaining a declaration of, 567.

act to facilitate proof of, 568.

Land Titles and Transfer Act (see stat. 38 & 39 Vict.
c. 87).

TITLE deeds, destruction, &c. of, 181, n.

mortgage by deposit of, 514, 524, n.

importance of possession of, 557.

who entitled to custody of, 557, 558.

in possession of mortgagee, 557, 559.

covenant to produce, 560, 561.

attested copies of, 545, 560.

grant of, 573, n., 632.

acknowledgment of right to produce, 561—563.

undertaking for safe custody of, 564.

TITLES of honour are real property, 9, 402.

TRADERS, debts of deceased, 105.

TRANSFER of land, 568.

of mortgages, 518, 519.

of property, Act to simplify (see stat. 7 & 8 Vict. c. 76).

TREASON, forfeiture for, 80, 91, 156, 156, n., 198.

abolition of forfeiture, 30, 80, 91, 156, 198.

TRIBAL COMMUNITY, 404.

TRUSTEE Act, 1850 . . 206.

bare, 141, 199, n., 441.

landlord, 485.

TRUSTEES made joint tenants, 164, 199.

difference between the rights of trustee and *cestui que trust*, 193, n.

failure of heirs of, 199.

descent of estate of trustee, 142, 165, 199, 263.

bankruptcy of, 205.

retirement of trustee, 209.

acts for appointing new, 206—208.

statutory power to appoint new trustees, 208, 209.

vesting of trust estate in new trustees, 206, 210.

conveyance of trustee's estate, 210.

of charity property, 98, 207.

incorporation of trustees of certain charities, 101.

official trustee of charity lands, 98.

stamps on appointment of new, 207, 211.

where they may sell or mortgage to pay testator's debts or legacies, 261.

estates of, under wills, 259.

to preserve contingent remainders, 332, 333.

such trustees not now required, 331.

declaration vesting land in future trustees, 368.

of copyholds, tenants to the lord, 445.

mortgages to, 517.

covenants by, on a sale, 535, 537, 538.

receipts of, good discharges, 548.

TRUSTS, 186, 190, 334.

notice of a trust, 193, n.

declarations of, stamp on, 201, n.

in a will, 259.

contingent remainders of trust estates, 334, 371.

of copyholds, 444.

for separate use, 120, 267, 268, 445.

for alien, 198.

limitation in cases of express, 550, 554.

not abolished, 215.

See also **EQUITABLE ESTATE**.

TURF, 31.

U, V.

VENDOR, lien of, for unpaid purchase-money, 515, 521.

covenants for title by a, 535, 572, 580, 632.

and Purchaser Act, 1874 (see stat. 37 & 38 Vict. c. 78).

rights of vendors and purchasers on sales made after 31st Dec. 1881 . . 542.

VESTED remainder, 301, 311.

definition of, 302.

See also **REMAINDER**.

- VESTING ORDERS**, 368, 393.
 declaration vesting land in future trustees,
 368.
- VICARAGES**, advowsons of, 398.
- VILLÆ**, 146.
- VILLAGE COMMUNITIES**, 5, n., 404.
- VILLANI**, 146, 404.
- VILLANUM SOCAGIUM**, 408.
- VILLEINS** regardant or in gross, 412, n.
- VILLENAGE**, **VILLENAGIUM**, 28, 403, 404, n., 411.
 tenure in, 405.
 Bracton's account of, 407.
 privileged villenage, 408.
 tenants in, anciently in a different state from free-
 holders, 425.
- VIRGATA**, 406, n., 612, n.
- UNBORN** persons, gifts to, 77, 323, 324, 325, 647.
- UNDERLEASE**, 477, 478.
 mortgage by, 514.
 contract for sale of, 543.
 sale of, 544.
 contract to grant, 546.
- UNITIES** of a joint tenancy, 162, 165.
- VOLUNTARY** conveyance, 102.
- VOUCHING** to warranty, 69.
- USER**, immemorial, 554.
 - abandonment by non-, 557.
- USES**, 186, 188, 219, 220, n., 234, 339, 343, 363.
 explanation of, 188, 343.
 statute of, does not apply to copyholds, 444.
 no use upon a use, 191.
 conveyance to, 224, 225.
 doctrine of, applicable to wills, 259.
 springing and shifting, 321, 339, 342, 343, 364, n., 371,
 448.
 examples of, 340, 341, 343.
 power to appoint a use, 345.
 to bar dower, 353, 632.
- USURY** laws, repeal of the, 516.

W.

- WAIVER** of breach of covenant in a lease, 467.
- WALES**, common appendant in, 620.

WARDSHIP, 149.

WARRANTY, 67, 69, 530.

formerly implied by word *give*, 530.
effect of express, 530.
now ineffectual, 532.

WASTE, 30, 31, 32, 33, 78, 103, 621.

committed in executing improvements under Settled
Land Act, 1882... 32.
equitable, 33.
by copyholder, 419.
common appendant, 605.
strips of, by the roadside, 379.

WATER, description of, 18.

limitation of right to, 556.
rights, passing on a conveyance, 574.

WAY, rights of, 380, 556, 574.

WIDOW, dower of, 281, 283, 285, n., 286, 546.
freebench of, 450.

WIDOWHOOD, estate during, 29.

WIFE, separate property of, 120, 121, 266, 267, 268, 269, 273,
275, n., 445, 449.

Married Women's Property Act, 1882... 266, 480.
equitable estate, 267.

equity to a settlement, 267, 479.
bankrupt husband, 267, n.

trusts for separate use enforced, 267.

conveyance of separate property, 280.

powers of, under Settled Land Act, 1882... 280.

conveyance of her lands, 280.

rights of, in her husband's lands, 121, 281, 286, 449, 450.

appointment by, and to, 349.

surrender of copyholds to use of, 440.

copyholds which are wife's separate property, 441, 450.

surrender of wife's copyholds, 441, 446, 447.

husband's interest in wife's copyhold lands, 449.

husband's right in her term, 479.

equitable interest in a term of years, 479.

See also **MARRIED WOMAN**.

WILL, tenant at, 417, 454.

cannot bar an estate tail, 78.

construction of, 25, 26, 254.

ignorance of legal rules, 254, 260.

alienation by, 85, 245.

witnesses to, 246, 248, 348, 442.

revocation of, 250, 251.

of real estate, now speaks from testator's death, 252.

gift of estate tail by, 253, 255, 257, 258.

gift of fee simple by, 255, 258.

